(5)

PROCEEDINGS AND ORDERS

DATE: 012?

CASE NBR 84-1-00629 CSX
SHORT TITLE Merrill Lynch, etc.
VERSUS McCollum, Ernest M., et al.

DOCKETED: Oct 16 198

Date	Proceedings and Orders
Oct 16 1984	Petition for writ of certiorari filed.
Nov 13 1984	Brief of respondents Ernest M. McCollum, et al. in opposition filed.
Nov 14 1984	DISTRIBUTED. November 30, 1984
Nov 20 1984	Reply brief of petitioner Merrill Lynch, etc. filed.
Dec 3 1984	REDISTRIBUTED. December 7, 1984
Dec 10 1984	REDISTRIBUTED. January 4, 1985
Jan 7 1985	Petition DENIED. Dissenting opinion by Justice White, with whom Justice Blackmun joins. (Detached opinion.)

****

1 AP

84-629

NO. ____________

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner

v.

ERNEST M. McCOLLUM, AND
SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Respondents

On Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3215 First City Tower
Houston, Texas 77002
(713) 651-2628

Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

45PP

QUESTIONS PRESENTED

1. DOES SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, WHICH SETS OUT PROCEDURES FOR ENFORCEMENT OF THE FEDERAL SUBSTANTIVE RIGHTS CREATED BY THE ACT, APPLY IN THIS STATE COURT PROCEEDING?

2. IF SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, IS NOT APPLICABLE IN THIS PROCEEDING, DOES THE PROCEDURE PROVIDED FOR BY TEXAS LAW IN ENFORCING ARBITRATION AGREEMENTS INSOFAR AS THAT PROCEDURE MAKES AVAILABLE TEMPORARY INJUNCTIVE RELIEF PENDING ARBITRATION VIOLATE THE FEDERAL SUBSTANTIVE POLICIES UNDERLYING THE ACT?

3. IF SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, IS APPLICABLE IN THIS PROCEEDING, DID THE COURTS BELOW PROPERLY CONSTRUE SECTION 3 OF THE ACT TO PRECLUDE ISSUANCE BY THE TRIAL COURT OF A TEMPORARY INJUNCTION PENDING ARBITRATION OF THE ISSUES IN DISPUTE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. ____________

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner

v.

ERNEST M. McCOLLUM, AND
SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Merrill Lynch, Pierce, Fenner & Smith, Inc.,[1] the petitioner herein, prays that writ of certiorari issue to review the judgment of the Supreme Court of Texas refusing review of the judgment of the Court of Appeals of Texas entered in the above-entitled case on February 9, 1984.

---

1. Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. is a corporation whose parent corporation is Merrill Lynch & Co., Inc. and affiliates or subsidiaries, except wholly owned affiliates or subsidiaries.

OPINION BELOW

The opinion of the court of appeals, reported at 666 S.W.2d 604, appears in Appendix B hereto.

JURISDICTION

The judgment of the court of appeals below was entered on February 9, 1984. A timely petition for rehearing was denied by that court on March 8, 1984. Petitioner's application for writ of error to the Supreme Court of Texas was refused, no reversible error, on June 20, 1984. A timely petition for rehearing was denied by that court on July 18, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 2-4 (1976), the Texas General Arbitration Act, TEX. REV. CIV. STAT. ANN. art. 235, §§ G (ii), (iii), (Vernon 1973) and the principal Texas statute regarding injunctions, TEX. REV. CIV. STAT. ANN. art. 4642 (Vernon Supp. 1940) are set forth at Appendix F.

STATEMENT OF CASE

This case arose on October 5, 1983, when Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), filed suit in the District Court of Harris County, Texas, against Ernest M. McCollum (McCollum) and Smith Barney, Harris, Upham & Co., Inc. (Smith Barney), seeking injunctive and monetary relief. The complaint set out facts alleging, among other things not now relevant, that McCollum, who was once employed by Merrill Lynch

as an account executive, voluntarily terminated his employment with Merrill Lynch to join Smith Barney, a rival investment firm that competes directly against Merrill Lynch. The complaint also alleges that McCollum has contacted Merrill Lynch clients to solicit business and/or the transfer of their accounts from Merrill Lynch to Smith Barney, has removed and taken records from Merrill Lynch in original or duplicate form, and has made use of such records, all of which activities constitute violations of McCollum's employment contract with Merrill Lynch. That contract provides in pertinent part:

> 1. All records of Merrill Lynch, including the names and addresses of its clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch, and that none of such records nor any part of them is to be removed from the premises of Merrill Lynch either in original form or in duplicated or copied form, and that the names, addresses, and other facts in such records are not to be transmitted verbally except in the ordinary course of conducting business for Merrill Lynch.
>
> 2. In the event of termination of my services with Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch whom I served or whose names became known to me while in the employ of Merrill Lynch in any community or city served by the office of Merrill Lynch, or any subsidiary thereof, at which I was employed at any time for a period of one year from the date of termination of my employment. In the event that any of the provisions contained in this paragraph and/or paragraph (1) above are violated I understand that I will be liable to Merrill Lynch for any damage caused thereby.

Paragraph 5 of the same document provides:

> 5. I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party in accordance with the constitution and rules of the New York Stock Exchange, then in effect.

On October 6, 1983, after hearing arguments of counsel for both parties, the trial court granted and signed a Temporary Restraining Order and Merrill Lynch posted bond.

On October 10, 1983, McCollum filed Defendant's Motion to Quash Temporary Restraining Order, Defendant's Request for Arbitration and Defendant's Plea in Abatement.

Upon request of the trial court, each of the parties filed memoranda of authorities concerning the issues: (1) whether arbitration is proper in this instance and (2) if arbitration is appropriate, whether the court has jurisdiction to grant a temporary injunction pending arbitration.

The Temporary Restraining Order was extended by agreement of the parties and an Agreed Extension of Temporary Restraining Order was signed by the court on October 18, 1983. On October 21, 1983, Merrill Lynch's application for temporary injunction came on for hearing. Prior to the presentation of any evidence, however, the court ruled from the bench that all of Merrill Lynch's complaints against McCollum and Smith Barney (as contained in Merrill Lynch's pleadings) were matters to be arbitrated under the Federal Arbitration Act, and that therefore, as a matter of law, the trial court lacked authority to conduct a temporary injunction hearing or to grant a temporary injunction. The trial court made this ruling without allowing Merrill Lynch the opportunity to present any evidence, but Merrill Lynch's counsel was allowed to make an "Offer of Proof" pursuant to Rule 103, Texas Rules of Evidence, as to what the testimony would have been had the court allowed Merrill Lynch's evidence. In its Order Denying Temporary Injunction, the trial court denied such as a matter of law, but also held that if Merrill Lynch's evidence at the temporary injunction hearing had been in accord with its Offer of Proof, Merrill Lynch will have made a *prima facie* case for issuance of a temporary injunction.[2] Thereafter, on the same day, the trial court signed an "Order Compelling Arbitration and Staying Case" pending completion of arbitration.[3]

From the trial court's "Order Denying Temporary Injunction" and "Order Compelling Arbitration and Staying Case," Merrill Lynch prosecuted an appeal. Among its points of error, Merrill Lynch assigned as error the trial court's holding, as a matter of law, that Merrill Lynch's Application for Temporary Injunction must be denied without allowing an evidentiary hearing, because the trial court based such decision on the erroneous conclusion of law that the court was without legal authority to issue a temporary injunction. On February 9, 1984, the Fourteenth Court of Appeals rendered an opinion affirming the trial court decision and held in short (1) that each count pled by Merrill Lynch is subject to arbitration and (2) that by virtue of 9 U.S.C. § 3, the trial court is without legal authority to issue a temporary injunction pend-

2. Appendix D, p. 17a.

3. Appendix E, p. 19a.

ing arbitration.[4] A Motion for Rehearing raising the same points of error as those raised on appeal was timely filed and denied by that court on March 8, 1984.[5]

Points of error questioning the validity of the court of appeals' interpretation of the Federal Arbitration Act, with specific reference to 9 U.S.C. § 3, and thus its holding that the trial court was without legal authority to entertain and issue a temporary injunction pending arbitration, were raised in Petitioner's Application for Writ of Error to the Supreme Court of Texas, which refused the application stating there was no reversible error.[6] A Motion for Rehearing was timely filed and denied by that court on July 18, 1984.[7] Petitioner seeks a writ of certiorari in light of the erroneous construction given by the state courts below of the Federal Arbitration Act and its application in state court proceedings.

REASONS FOR GRANTING WRIT

The decision below is wrong as a matter of statutory construction. Although a temporary injunction is involved in this case, the "abuse of discretion" standard is not applicable. The question in this case is whether the trial court and Texas appellate courts were correct in holding that the Federal Arbitration Act ("the Act") withdraws a state court's legal authority to issue a temporary injunction pending arbitration of disputes arbitrable under the Act. Petitioner respectfully submits that the lower courts have erroneously decided important federal questions concerning the proper interpretation of the Act and its application in state court proceedings.

4. Appendix B, p. 3a.

5. Appendix C, p. 16a.

6. Appendix A, p. 1a.

7. Appendix A, p. 2a.

I.

It is clear from this Court's decision in *Southland Corp. v. Keating*, ____U.S.____, 104 S.Ct. 852, 858 (1984), that Congress, in enacting the Federal Arbitration Act, created a substantive rule applicable in state as well as federal courts mandating the enforcement of arbitration agreements. A state statute attempting to undercut that mandate would be preempted by the Act. *Id.* at 861. However, beyond this conclusion, which is compelled by the language of Section 2 of the Act,[8] it is by no means clear that Congress intended the preemptive effect of this statute to be so unyielding as to deprive states from fashioning and applying their own procedures to enforce that federally created right.

Sections 3 and 4 of the Act[9] purport to provide the procedural mechanisms for enforcing the Act. However, those sections by their express terms apply only to the federal courts. This Court stated in its opinion in *Southland Corp. v. Keating*, that "[i]n holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that Sections 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Id.* at 861 n. 10. Accordingly, this Court in *Southland* expressly reserved for future decision the question whether Sections 3 and 4 of the Act are applicable in state court proceedings.

The courts below held that the state trial court had no legal authority to grant temporary injunctive relief

8. Appendix F, p. 21a.

9. Appendix F, pp. 21a-22a.

pending arbitration by virtue of the mandatory terms of Section 3 of the Federal Arbitration Act. Petitioner submits that the lower courts erred in applying Section 3 in this state court proceeding. While state courts are without power to detract from "substantive rights" created by Congress, they have always been permitted to apply their own reasonable procedures when enforcing those rights absent specific direction from Congress to the contrary. *Southland Corp. v. Keating,* 104 S.Ct. at 869 (O'Connor, J., dissenting); *Minneapolis & St. Louis Railroad Co. v. Bombolis,* 241 U.S. 211, 221-222 (1916). There is nothing in the legislative history of the Act that would suggest that Congress intended state courts to apply federal procedures in place of their own for the enforcement of the federal right created thereunder. Petitioner respectfully submits that Section 3 has no application in this state court proceeding, and that the Texas courts erred in holding to the contrary.

As noted by this Court in *Southland,* "the overwhelming proportion of all civil litigation in this country is in the state courts." *Id.* at 860. Until the applicability of Section 3 of the Act in state court proceedings is resolved by this Court, confusion and uncertainty will reign in the state courts as to the proper procedural law applicable in enforcing the Federal Arbitration Act. The present case squarely presents this Court with an opportunity to resolve this important question of federal law which was expressly reserved in *Southland.*

II.

Petitioner acknowledges that if it is correct in its contention that Section 3 of the Act is inapplicable in state proceedings, the procedures provided for by state law

(which would then be applicable) nonetheless must not undermine the federal substantive rights created by Congress. Otherwise, state law will be preempted by the Act. *Southland Corp. v. Keating,* 104 S.Ct. at 861. Utilizing this analysis, an additional question must be addressed in determining the availability in this case of temporary injunctive relief pending arbitration: Does the Federal Arbitration Act preempt Texas procedural law to the extent it allows temporary injunctive relief pending arbitration?

It is clear that Texas procedural law makes available temporary injunctive relief pending arbitration. The Texas legislature has passed a specific statute authorizing such relief. *See* TEX. REV. CIV STAT. ANN. art. 235 (G)(ii) and (iii) (Vernon 1973)[10] Furthermore, in a case such as this where a lawsuit has actually been initiated, temporary injunctive relief is available pursuant to the principal Texas statute governing injunctions, TEX. REV. CIV. STAT. ANN. art. 4642 (Vernon 1940).[11] The question is whether the Federal Arbitration Act and the substantive federal rights created thereunder preempt these injunction statutes to the extent they make available temporary injunctive relief pending arbitration of disputes arbitrable under the Act.

As this Court recently observed in *Silkwood v. Kerr-McGee Corp.,* ___U.S.___, 104 S.Ct. 615, 621 (1984),

> State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced

10. Appendix F, p. 23a.

11. Appendix F, p. 24a.

state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Although in *Southland Corp. v. Keating,* 104 S.Ct. at 861, an examination of the statutory scheme and legislative history of the Federal Arbitration Act convinced this Court that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," there is nothing in that statutory scheme or legislative history which would suggest that Congress intended to exclude all state regulation of arbitration agreements. Accordingly, the first branch of the preemption test is not satisfied. The remaining question is whether the availability of temporary injunctive relief conflicts with the substantive law created in the Federal Arbitration Act.

The Federal Arbitration Act does not expressly prohibit a trial court from issuing a temporary injunction pending arbitration. Accordingly, there is no impossibility of compliance with both state and federal law. Furthermore, the Texas injunction statutes as applied to pending or prospective arbitration proceedings do not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. In enacting the Federal Arbitration Act, Congress declared a national policy favoring enforcement of arbitration agreements. *Id.* at 858. Availability of the temporary injunction remedy will not hinder the arbitration process but will merely allow the status quo to be preserved pending resolution of the

dispute in arbitration. There is no indication that Congress even considered precluding the use of provisional remedies in instances such as this where at the early stage of arbitration, when preliminary relief is most needed, there are no arbitrators to whom application for injunctive relief can be made.

Finally, as Justice Stevens recently noted in the context of the Federal Arbitration Act, "[t]he exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress." *Southland Corp. v. Keating,* 104 S.Ct. at 862 (Stevens, J., dissenting), *citing, Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978). There is nothing in the Act or its legislative history that suggests that it was "the clear and manifest purpose of Congress" to preclude issuance by state courts of temporary injunctions pending arbitration of issues arbitrable under the Act to preserve the status quo pending arbitration. As a result, the Act should not be so construed.

The importance of this question is demonstrated by the differing results reached in the supreme courts of the various states on the question whether temporary injunctive relief is available pending arbitration of issues arbitrable under the Act. Specifically, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court, City and County of Denver,* 672 P.2d 1015 (Colo. 1983) and *American Eutectic Welding Alloys Sales Co., Inc. v. Flynn,* 161 A.2d 364 (Pa. 1960), the supreme courts of Colorado and Pennsylvania expressly held that the temporary injunction mechanism is available to preserve the status quo pending arbitration, even in the face of a valid arbitration agreement, while in this case, the lower

courts determined that temporary injunctive relief pending arbitration is unavailable. Petitioner respectfully submits that this Court should resolve the issue whether the temporary injunction mechanisms made available in state court proceedings under state law are preempted by the Federal Arbitration Act as applied to pending or prospective arbitration proceedings, and thereby resolve any uncertainty in the proper interpretation of that Act as applied in the state courts.

III.

In the event Section 3 of the Federal Arbitration Act applies in state court proceedings, the question is whether Section 3 (which governs enforcement of the Act) precludes a trial court from issuing a temporary injunction pending arbitration. In holding that the trial court had no legal authority to issue a temporary injunction pending arbitration, the court of appeals in this case relied on that portion of Section 3 providing that if the court is satisfied the dispute is arbitrable, "the court . . . shall . . . *stay the trial of the action* until such arbitration has been had. . . ." 9 U.S.C. § 3 (emphasis added). Petitioner respectfully submits that the state courts below have erroneously construed Section 3 of the Act.

The court of appeals in this case interpreted the phrase "stay the trial" very broadly, holding that that language prohibits all further proceedings before the trial court upon that court's determination that the issues involved in the dispute are arbitrable.[12] There is, however, no reason for such an expansive reading of the statutory language. The purpose of a temporary injunction is to

12. Appendix B, p. 11a.

preserve the status quo pending a final resolution on the merits. Availability of the temporary injunction mechanism pending arbitration does not affect final resolution of the dispute *in arbitration*. Accordingly, use of the temporary injunction mechanism pending arbitration in no way impedes the substantive federal policy behind the Federal Arbitration Act that arbitration agreements shall be enforced.

Furthermore, it is important to note that at least until an arbitration panel has been appointed to hear a particular case, and most likely even after such appointment, there is no forum (other than the courts) in which relief may be sought to preserve the status quo pending final resolution of the disputes in arbitration. In fact, this Court has specifically recognized the problem of "the unavailability of equitable relief in the arbitration context." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970). Under the court of appeals' interpretation of Section 3, there would be a period of time during which the claimant would have no forum in which to seek preservation of the status quo. Petitioner respectfully submits that Congress could not have intended the "stay the trial" language of Section 3 of the Act to strip a claimant of the only procedure available to prevent irreparable harm resulting from the other party's actions. The concept of "irreparable harm" by definition entails harm which cannot be compensated by way of monetary damages. Section 3 should not be construed to preclude a claimant from preventing irreparable harm and preserving the status quo until the dispute can be finally resolved *in arbitration*.

The important role of the injunction pending arbitration has previously been recognized by this Court. In

Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. at 246, this Court described the injunction as an "important . . . remedial device, particularly in the context of arbitration." Yet the construction given to Section 3 by the courts below would make injunctions pending arbitration *totally unavailable.* The statutory phrase "stay the trial" should not be stretched to yield such an undesirable result.

Petitioner submits that its construction of Section 3 is also consistent with principles of federal statutory construction relating to preemption of state law. Specifically, as noted above, this Court has held that state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978); *Southland Corp. v. Keating,* ___U.S.___, 104 S.Ct. 852, 862 (1984) (Stevens, J., dissenting). Yet if the court of appeals' interpretation of Section 3 is correct, that Section preempts the injunction laws of each and every state as applied to disputes which are arbitrable under the Federal Arbitration Act. It is neither "clear" nor "manifest" that this was the result which Congress intended. Petitioner respectfully submits that Section 3 should be construed in harmony with the temporary injunction statutes of the states and as not precluding the issuance by state trial courts of temporary injunctions pending arbitration.

This question of statutory construction is of critical importance due to a split in the United States Circuit Courts of Appeals. Specifically, in *Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064 (2d Cir. 1972)

and *Sauer-Getriebe KG v. White Hydraulics, Inc.,* 715 F.2d 348 (7th Cir. 1983), the Second and Seventh Circuits held that although a dispute is arbitrable under the Federal Arbitration Act, a trial court has the power to issue a temporary injunction pending arbitration. However, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,* 726 F.2d 1286 (8th Cir. 1984) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott,* No. 83-1480 (10th Cir. May 12, 1983) (not reported), the Eighth and Tenth Circuits held that temporary injunctive relief pending arbitration is not available in connection with a dispute arbitrable under the Federal Arbitration Act. Petitioner respectfully submits that this Court should review the decision below to resolve the split in the Circuits concerning the availability of temporary injunctive relief pending arbitration under Section 3 of the Federal Arbitration Act.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Kenneth E. Johns Jr.

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3215 First City Tower
Houston, Texas 77002-6760
(713) 651-2628

October 15, 1984

CERTIFICATE OF SERVICE

I, Kenneth E. Johns, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Merrill Lynch, Pierce, Fenner & Smith, Inc., Petitioner herein, hereby certify that on October 15, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the above and foregoing Petition For A Writ Of Certiorari To The Supreme Court Of Texas on each of the parties herein, as follows:

On Ernest M. McCollum and Smith Barney, Harris, Upham & Co., Inc., Respondents herein, by depositing such copies in the United States Post Office, Houston, Texas, with first class postage prepaid, properly addressed to the post office address of Mark C. Watler, the above-named Respondents' counsel of record, at Woodard, Hall & Primm, 4700 Texas Commerce Tower, Houston, Texas 77002.

All parties required to be served have been served.

Dated October 15, 1984.

Kenneth E. Johns, Jr.

Kenneth E. Johns, Jr.
Vinson & Elkins
3200 First City Tower
Houston, Texas 77002
(713) 651-2628

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. C-2953 June 20, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM ET AL.

From HARRIS County,

FOURTEENTH District.

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Merrill Lynch, Pierce, Fenner & Smith, Inc., and its surety, Federal Insurance Company, pay all costs incurred on this application.

No. C-2953 July 18, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM ET AL.

From HARRIS County,

FOURTEENTH District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 19th day of July, 1984.

GARSON R. JACKSON, Clerk

By /s/ FRITZI BORN, Deputy.
Fritzi Born

APPENDIX B

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC.,
Appellant,

v.

Ernest M. McCOLLUM, and
Smith Barney, Harris, Upham & Co., Inc.,
Appellees.

No. B14-83-731CV.

Court of Appeals of Texas,
Houston (14th Dist.).

Feb. 9, 1984.

Rehearing Denied March 8, 1984.

Kelly J. Coghlan, Vinson & Elkins, Houston, for appellant.

Mark C. Watler, Woodard, Hall & Primm, Houston, for appellees.

Before ROBERTSON, SEARS and ELLIS, JJ.

OPINION

ROBERTSON, Justice.

This is appeal from the trial court's: (1) denial of appellant's application for temporary injunction, (2) granting an order compelling arbitration and (3) staying the case pending completion of arbitration. Appellant

raises five points of error complaining of the trial court's denying the temporary injunction "as a matter of law, without allowing an evidentiary hearing," considering "unreported and not to be reported case authority," and granting the order to stay the case and compel arbitration since a state court is "not granted the authority under the Federal Arbitration Act to compel arbitration." We affirm.

Appellee, Ernest McCollum ("McCollum"), on or about February 20, 1979, began his employment with appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Both parties signed an Account Executive Training Agreement and Account Executive Agreement, having identical clauses regarding post-employment solicitation of Merrill Lynch clients and post-employment use of books and records of Merrill Lynch. On or about August 9, 1983, McCollum voluntarily terminated his employment with Merrill Lynch and on or about the same day commenced working for appellee Smith Barney, Harris, Upham & Co., Inc., ("Smith Barney"). Merrill Lynch, in its First Amended Original Petition and Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction, brought four "counts:" "Illegal Disclosure and Use of Trade Secrets," "Tortious Interference with Contractual and Business Relations," "Contractual Violations of McCollum," and "Unjust Enrichment." In the body of its petition, Merrill Lynch alleged that McCollum has "contacted Merrill Lynch clients to solicit business and/or the transfer of their accounts from Merrill Lynch to Smith Barney, . . . removed and taken records of Merrill Lynch . . . in original or in duplicated form and has made use of such records, . . . tortiously interfered with the con-

tractual relations between Merrill Lynch and its customers, . . . and encouraged and enticed Merrill Lynch brokers and other personnel to breach their employment contracts with Merrill Lynch." Merrill Lynch alleged that Smith Barney had reason to know of the employment agreements and their terms and that Smith Barney encouraged McCollum in his actions.

Four of appellant's points of error concern the trial court's denial of temporary injunctive relief. Merrill Lynch sought a temporary injunction enjoining appellees from further use of confidential information and further solicitation of Merrill Lynch clients. The trial judge, in denying the application, at least in part, relied on the court's finding that all matters pled by appellant were subject to arbitration. In its first point appellant contends that the trial court erred in finding all matters pled subject to arbitration. We disagree.

First, the trial court had to decide whether an agreement to arbitrate existed, and if so, whether the matters pled by Merrill Lynch came within that agreement. Paragraph 1 & 2 of the Account Executive Agreement proscribe many of the acts which McCollum is accused of committing.

> All records of Merrill Lynch including the names and addresses of the clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after termination for any reason of my employment with Merrill Lynch, and that none of such records nor any part of them is to be removed from the premises of Merrill Lynch either in original form or in duplicated or copied form . . .

> In the event of termination of my service with Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch whom I served or whose names become known to me while in the employ of Merrill Lynch, or any subsidiary thereof at which I was employed at any time for a period of one year from the date of termination of my employment . . .

Paragraph 5 of the same document provides:

> I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party in accordance with the constitution and Rules of the New York Exchange, then in effect.

[1] Merrill Lynch argues that not all of the matters pled are arbitrable since some took place after McCollum terminated his employment with Merrill Lynch and are founded in tort; consequently, they do not come within the parties arbitration agreement which covers controversies "arising out of my employment or the termination of my employment." It cites *Coudert v. Paine Webber Jackson & Curtis,* 705 F.2d 78 (2d Cir. 1983) for this proposition. In *Coudert,* a registered representative sued her former employer brokerage firm claiming defamation, invasion of privacy and intentional infliction of emotional distress. In reversing the trial court, the appellate court held "rather, the dispute itself does not pertain to employment or termination of employment; the tortious acts are all claimed to have occurred after such termination." *Id.,* at 82. Merrill Lynch would have us hold that the *timing* of the alleged controversial acts

are determinative of whether the controversy "arises out of employment or termination of employment." We refuse to so hold. We believe *Coudert* should be limited to its facts in that the post-employment controversy concerned tortious conduct alone, not violations of the parties employment agreement such as the case before us. We find support for our position in *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 725 F.2d 192 (8th Cir. 1984). "In the present case, the temporal aspect is an inevitable consequence of the contract clause in issue." *Id.,* at 195. We believe the proper approach to be an inquiry as to whether the subject matter of the complaints arose out of the parties employment agreement or termination of employment. The mere timing of the controversial acts should not be controlling. In the case at bar Merrill Lynch argues that the express terms of the employment agreement were violated, but since these alleged violations took place after the employee-employer relationship terminated, the controversy does not arise out of employment or termination of employment. We cannot accept this argument.

Merrill Lynch and Smith Barney are members of the New York Stock Exchange and McCollum is a registered representative of the exchange. There is substantial authority for the proposition that, irrespective of the parties employment agreement as drafted by Merrill Lynch, the constitution and rules of the New York Stock Exchange constitute a part of that employment agreement given the parties relationship to the exchange. The scope of the arbitration provisions in these rules and the constitution is even broader than the provisions in the Account Executive Training Agreement and Account Executive Agreement entered into by the parties.

Section 2 of the Arbitration Act, 9 U.S.C. Section 2 (1970), makes enforceable all arbitration agreements concerning transactions relating to commerce . . . Article VIII, Section 1 of the New York Stock Exchange Constitution provides:

> Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, . . . shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors.

Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972), cert. denied, 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972).

> The constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other and with the exchange itself. . . . Since the rules of the Exchange 'constitute a contract between the members, the arbitration provisions which they embody have contractual validity.' * * * The Exchange provisions requiring arbitration constitute an agreement to arbitrate which is binding upon both [parties].

Brown v. Gilligan, Will & Co., 287 F.Supp. 766, 769-770 (S.D. N.Y. 1968).

The counts and allegations pled by Merrill Lynch are set out in the second paragraph of this opinion. At oral argument, Merrill Lynch argued emphatically that three of the counts were non-arbitrable because they did not

"arise out of employment or termination of employment." In "count three" Merrill Lynch alleged a cause of action against Smith Barney for "unjust enrichment." No authority was cited recognizing unjust enrichment as a cause of action and our research has yielded none. Quantum meruit is recognized as a cause of action designed to prevent unjust enrichment. Even if "unjust enrichment" were a cause of action we believe it would come within the scope of the constitution and rules of the New York Stock Exchange. Merrill Lynch has not seriously contended that the constitution and rules of the New York Stock Exchange are not applicable to the controversy before us. The trial judge found all the matters pled subject to arbitration. He did not articulate whether he believed them arbitrable pursuant to the parties agreement or the constitution and rules of the New York Stock Exchange. Thus given the applicability of the parties Account Executive Agreement, Account Executive Training Agreement and the rules and constitution of the New York Stock Exchange (particularly Article VIII), we hold that the trial judge did not abuse his discretion in determining that each count pled by Merrill Lynch was subject to arbitration. We find support for our decision in the following cases; *Wichmann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 726 F.2d 1286 (8th Cir. 1984), *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192 (2nd Circuit 1984), *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson, et al.*, 574 F.Supp. 1372 (E.D. Mo. 1983). *Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F.Supp. 904 (N.D. Tex. 1983) (order denying preliminary injunction). Appellant's first point of error is overruled.

[2-4] In its second and fifth points of error, Merrill Lynch claims the trial court erred in denying its application for temporary injunction because the trial court believed it was without legal authority to issue a temporary injunction. At oral argument both parties argued the issue as to whether the trial judge was correct in denying Merrill Lynch's application for temporary injunction *pending arbitration*. The record shows that Merrill Lynch prayed for "a Temporary Injunction pending final trial herein, or until August 9, 1984, whichever date comes first . . . That the Court upon final hearing, make permanent the temporary Injunction. . . ." *A temporary injunction pending arbitration was never prayed for by Merrill Lynch,* either in the alternative or by amended petition, thus we question whether the issue is properly before us on appeal. Obviously, the trial court could not grant relief not prayed for. However, in light of the fact the trial court in its Order Denying Temporary Injunction stated "this Court therefore lacks authority to grant a temporary injunction pending arbitration," we will address the issue. The Federal Arbitration Act, 9 U.S.C. §§ 3-4 (1976), is instructive in this matter.

> § 3. Stay of proceedings where issue therein referable to arbitration.
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for

> the stay is not in default in proceeding with such arbitration.
>
> § 4
>
> . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

The statute's terms are mandatory and the policy behind having arbitration policy in the first place is that once the arbitration procedure is started it should be speedy and not subject to delay and obstruction in the courts. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed. 2d 1270 (1967). At oral argument, appellant strenuously defended his position that the language in § 3 "stay the trial" should not be read so as to prevent a trial court from conducting an evidentiary hearing for the purposes of ruling on an application for temporary injunction. We are unpersuaded that such a narrow reading of the word "trial" was intended. As we read the statute, the trial court is obliged to conduct a very narrow two step inquiry. First, it must determine whether a written agreement to arbitrate the subject matter of the present dispute exists between the parties. Second, if such an agreement exists, the court then addresses the question of whether the agreement has been breached. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* ___U.S. ___, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). See also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson, et al.,* 574 F.Supp. 1472 (E.D. Mo. 1983). While we are not bound by the decisions of the United States Dis-

trict Courts or even the United States Courts of Appeal, we have read numerous recent opinions in these courts which have dealt with issues similar if not exactly the same as those before us. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro,* 577 F.Supp. 616 (W.D. Mo. 1983) the court was presented with the issue of "whether the language, 'shall . . . stay the trial of action,' contained in section three, is limited only to a trial on the merits or whether it prohibits all further proceedings before the Court." Merrill Lynch argued in that case as it did before the trial judge here and continues to argue to us that if a temporary injunction is not entered nothing will be left to arbitrate. In denying the application for temporary injunction without an evidentiary hearing, the court in *DeCaro* remarked

> The merits of an arbitrable dispute are for the arbitrator to decide. A court, however, in ruling on a motion for preliminary injunction must consider the merits of the movant's claim and his chances for success. The Court's findings in this regard along with findings in relation to the other factors to be considered would be cited by the parties and could interfere with the arbitrator's independent determination of the issues.

See also *Wichmann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 726 F.2d 1286 (8th Cir. 1984). We agree with the reasoning contained in the above cases. The trial court was correct in denying Merrill Lynch's application for temporary injunction without conducting an evidentiary hearing. Appellant's second and fifth points of error are overruled.

[5] Merrill Lynch, in its fourth point of error, contends the trial court was without authority under the

Federal Arbitration Act to compel arbitration. While the statute does not by name authorize the state courts to enforce its provisions, Texas courts have enforced arbitration agreements falling within the Federal Arbitration Act. *White-Weld & Company, Inc. v. Mosser,* 587 S.W. 2d 485, 488 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), *Miller v. Puritan Fashions Corp.,* 516 S.W.2d 234 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.), *Mamlin v. Susan Thomas, Inc.,* 490 S.W.2d 634, 637 (Tex. Civ. App.—Dallas 1973, no writ).

Merrill Lynch's argument has been raised and rejected in other jurisdictions as well. In *Episcopal Housing Corp. v. Federal Ins. Co.,* 269 S.C. 631, 239 S.E.2d 647, 652 (1977) the Supreme Court of South Carolina made the following disposition:

> Accordingly, the petition of the plaintiff EHC to enjoin further proceedings in arbitration are denied, and the temporary stays against further proceedings in arbitration are dissolved. The petitions of both Lafaye and McCrory to proceed with arbitration are granted, . . . and all further proceedings in this court are stayed until arbitration is ended.

The court held the Federal Arbitration Act superceded South Carolina common law and was enforceable in the state courts. In *Youmans v. Dist. Ct. In & For City of Denver,* 197 Colo. 28, 589 P.2d 487, 488 (1979) the Colorado Supreme Court sitting en banc made the following decision:

> The question before us is whether a member of the NYSE can compel a non-member registered representative of the NYSE to arbitrate a controversy between them arising out of the employment or

termination of employment of the registered representative by the member. We answer affirmatively.

See also *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378, 380-381 (1977). We note that the United States Supreme Court has not expressly resolved the question. In *Southland Corp. v. Keating,* ____U.S.____, 104 S.Ct. 852, 79 L.Ed. 2d 1 (1984), the court reversed the Supreme Court of California and held that the Federal Arbitration Act preempted a state law withdrawing the power to enforce arbitration agreements. It is clear that the issue of arbitrability is governed by a body of substantive federal law applicable in both state and federal court. "Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act. It is less clear, however, whether the same is true of an order to compel arbitration under § 4 of the Act." *Moses E. Cone Memorial Hosp. v. Mercury Construction Corp.,* ____U.S.____, 103 S.Ct. 927, 942, 74 L.Ed.2d 765 (1983). While the United States Supreme Court has yet to be presented with a fact situation requiring it to expressly hold that § 4 applies to state court proceedings, we believe it would be illogical to have a court empowered to deny injunctive relief and grant stays of litigation, yet be powerless to compel arbitration. We hold that the trial court had the power to compel arbitration under the Federal Act. Point of error number four is overruled.

[6] In its third point of error, Merrill Lynch complains of the trial court's "considering unreported case authority for its legal conclusions and authority, and in allowing appellees to cite such authority." Tex. R. Civ. P. 452(f), the applicable rule, provides: "Unpublished opin-

ions shall not be cited as authority by counsel or by a court." The rule is silent as to whether it is intended to prohibit citations to all unpublished opinions or only unpublished opinions of the courts of appeals. The rule is contained in Part III, Rules of Procedure for the Courts of Civil Appeal. We note there is no such corresponding federal rule. The rule is also silent as to the appropriate sanction for a violation. In *Berry v. Berry,* 647 S.W.2d 945, 947 (Tex. 1983), the Texas Supreme Court stated: "Part II, the unpublished portion of the opinion, is of no precedential value and should not be cited." We assume the court there simply refused to consider the unpublished opinion. In the case before us, although unreported (and not to be reported) case authority was cited, we find no evidence that the trial court in any way based its decision or even considered the unreported cases cited. Merrill Lynch's third point of error is overruled.

The judgment of the trial court is affirmed.

APPENDIX C

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 8, 1984

Hon. Kelly J. Coghlan
Vinson & Elkins
3215 First City Tower
Houston TX 77002

Hon. Mark C. Watler
Woodard, Hall & Primm
4700 Texas Commerce Tower
Houston TX 77002

RE: CASE NO. 14-83-00731-CV TRIAL COURT CASE NO. 83-61472

STYLE: Merrill Lynch, Pierce, Fenner & Smith, Inc.
V: McCollum, Ernest M., et al

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 9, 1984.

Respectfully yours,

Mary Jane Smart, Clerk

By: /s/ CHARLENE MITCHELL
Deputy

APPENDIX D

NO. 83-61472

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
333RD JUDICIAL DISTRICT

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM AND
SMITH BARNEY, HARRIS UPHAM
& COMPANY, INC.

ORDER DENYING TEMPORARY INJUNCTION

BE IT REMEMBERED that the 25th day of October, 1983, came on for hearing Plaintiff's Application for Temporary Injunction. Due notice having been given, and all parties having appeared by and through counsel, the Court convened the hearing, and Plaintiff and Defendants announced ready. At such time and prior to any evidence being presented, the Court announced that after reading the briefs and examining all of the pleadings and other documents on file, the Court was of the opinion that all of the matters contained in Plaintiff's First Amended Original Petition and Plaintiff's First Supplemental Petition to Plaintiff's First Amended Petition were subject to arbitration and, therefore, as a matter of law, the Court must deny Plaintiff's Application for Temporary Injunction, notwithstanding any evidence that might have been presented at the temporary injunction hearing, and the Court hereby so holds.

Immediately after the Court's announcement, Plaintiff moved to put on evidence in support of Plaintiff's Application for a Temporary Injunction. The Court denied Plaintiff's motion to go forward with evidence. The Plaintiff's counsel was allowed to make an offer of proof pursuant to Rule 103, Texas Rules of Evidence, as to what the testimony would have been had the Court allowed Plaintiff's evidence. The Court is of the opinion, and so holds, that if the Plaintiff's evidence at the temporary injunction hearing had been in accordance with Plaintiff's offer of proof, Plaintiff would have thereby made a prima facie case for the issuance of a temporary injunction. Even if Plaintiff had demonstrated by actual evidence all elements normally necessary to support the issuance of a temporary injunction, the Court nevertheless could not issue a temporary injunction under the Court's holding that all matters at issue in this action are subject to arbitration. The Court announced at the hearing and so holds that as a matter of law all of the actions brought by Plaintiff against Ernest M. McCollum and Smith Barney, Harris Upham & Company, Inc. are subject to arbitration, and this Court therefore lacks authority to grant a temporary injunction pending arbitration.

It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff's Application for a Temporary Injunction is denied.

SIGNED this 25th day of October, 1983. 2:14 p.m.

/s/ DAVIE WILSON
Judge Presiding

APPENDIX E

NO. 83-61472

IN THE DISTRICT COURT OF
HARRIS COUNTY, T E X A S
333RD JUDICIAL DISTRICT

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC.

v.

ERNEST M. McCOLLUM AND
SMITH BARNEY, HARRIS UPHAM &
COMPANY, INC.

ORDER COMPELLING ARBITRATION AND STAYING CASE

BE IT REMEMBERED that on October 25, 1983, came on for hearing Defendant's Plea in Abatement and Motion to Compel Arbitration. The Court, after considering the Motion, the arguments of counsel, the pleadings, and all documents on file, is of the opinion that all of the matters in Plaintiff's pleadings are matters that must be arbitrated and are matters which this Court therefore has no authority to decide, and that all further proceedings in this action must be stayed pending arbitration.

It is therefore,

ORDERED, ADJUDGED and DECREED that the parties hereto are compelled to arbitrate the disputes existing between them that are contained in the pleadings on file in this case. It is further,

ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause is hereby stayed pending arbitration.

SIGNED this 31st day of Oct., 1983.

/s/ DAVIE WILSON
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

WOODARD, HALL & PRIMM

By: /s/ MARK C. WATLER
Mark C. Watler
Texas Bar No. 20931300

4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

APPROVED AS TO FORM ONLY:

VINSON & ELKINS

By: ____________________
Mr. Kelly J. Coghlan
Texas Bar No. 04506300

3215 First City Tower
Houston, Texas 77002
(713) 651-2796

APPENDIX F

Statutory Provisions Involved

Title 9—Arbitration, United States Code

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding there-

under, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

Vernon's Annotated Texas Statutes

Art. 235. Applications to courts and the effect thereof; court proceedings on applications to courts; venue thereof; stay of proceedings in another court pursuant to a later application; what the court may require that an application contain; when applications may be filed in advance of or pending or at or after the conclusion of arbitration proceedings; acquisition of jurisdiction over adverse parties by service of process or in rem by ancillary proceedings; court relief in aid of pending or prospective arbitration proceedings or the enforcement of court orders or decrees or satisfaction of court judgments; court hearings on applications

. . . .

Sec. G. In advance of the institution of any arbitration proceedings, but in aid thereof, an application may be filed for order or orders to be entered by the court, including but not limited to applications: . . . (ii) invoking the jurisdiction of the court over the controversy in rem, by attachment, garnishment, sequestration, or any other ancillary proceeding in the manner by which, and on complying with the conditions under which, such proceedings may be instituted and conducted ancillary to a civil action in a district court; or (iii) seeking to restrain or enjoin the destruction of the subject matter of the controversy

or any essential part thereof, or the destruction or alteration of books, records, documents, or evidence needed for the arbitration proceeding, or seeking from the court in its discretion, order for deposition or depositions needed in advance of the commencement of the arbitration proceedings for discovery, for perpetuation of testimony or for evidence; . . . .

Article 4642. 4643, 2989 Grounds for

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.

2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.

3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

4. Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. Acts. 1907, p. 206; Acts 1909, p. 354; Const., Art 5, secs. 8, 16.

No. 84-629

In The

Supreme Court of the United States

October Term, 1984

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Petitioner,

v.

Ernest M. McCollum and
Smith Barney, Harris Upham & Co., Inc.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mark C. Watler
WOODARD, HALL & PRIMM
4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

*Attorneys for Respondents
Ernest M. McCollum and
Smith Barney, Harris Upham & Co.,
Inc.*

56pp

QUESTIONS PRESENTED

1. Does this Court have certiorari jurisdiction under 28 U.S.C. § 1257(3), since the state-court decision below did not invalidate, nor does Petitioner ask this Court to invalidate, any state statute?

2. In a case subject to arbitration and a mandatory stay under both federal and state law, must the trial court conduct an exhaustive evidentiary adjudication of the merits of the controversy and order injunctive relief?

3. Is Petitioner's erroneous perception of a federal/state preemption question meritorious, where the relevant federal and state arbitration statutes are substantially identical?

4. Has Petitioner's claim for injunctive relief (seeking to enforce a contractual covenant which has now expired) become moot?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-629

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

ERNEST M. MCCOLLUM and
SMITH BARNEY, HARRIS UPHAM & CO., INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Justices of the Supreme Court of The United States:

Respondents oppose the Petition for Writ of Certiorari.

CITATION TO OPINION BELOW

The opinion of the Texas Court of Appeals, which is now reported at 666 S.W.2d 604, is reprinted herein as Appendix A. On June 20, 1984, the Supreme Court of Texas denied an Application for Writ of Error to review that decision (with the notation "no reversible error"). On July 18, 1984, the Supreme Court of Texas denied rehearing.

JURISDICTIONAL STATEMENT

Petitioner relies on 28 U.S.C. § 1257(3) as the jurisdictional basis for its Petition for Writ of Certiorari. Respondents, however, contend that this Court lacks such jurisdiction, as argued *infra* at 2-3.

STATUTES AND RULES INVOLVED

The text of 28 U.S.C. § 1257(3) appears at Appendix B; TEX. REV. CIV. STAT. ANN. art. 235(G)(ii) and (iii) (Vernon 1973) at Appendix C; TEX. REV. CIV. STAT. ANN. art.

4642, at Appendix D; 9 U.S.C. §§ 2,3, and 4, at Appendix E; New York Stock Exchange Constitution article VIII, section 1, at Appendix F; New York Stock Exchange Rule 347, at Appendix G; TEX. REV. CIV. STAT. ANN. art. 224 (Vernon 1973), at Appendix K; and REV. REV. CIV. STAT. ANN. art. 225 at Appendix L.

ARGUMENT

The state court decisions below were eminently correct and do not warrant review by this Court.

1. Respondents question whether this Court has jurisdiction to grant a writ of certiorari to review this case. Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter "Merrill Lynch") relies on 28 U.S.C. § 1257(3) (set out in Appendix B) as the jurisdictional basis for its Petition (hereinafter "M.L. Pet."). M.L. Pet. 2. As that statute applies to this case, this Court's certiorari jurisdiction would exist if the state-court decision below drew into question the validity of a state statute on the grounds of its being repugnant to the Constitution or laws of the United States. However, the state-court decision which Merrill Lynch seeks to have this Court review did not in any conceivable manner invalidate any state statute (on supremacy grounds or otherwise); indeed, the opinion of the Texas Court of Appeals[1] made no mention of any state statute. Appendix A.

Merrill Lynch argues to this Court that the opinion below *implicitly* invalidated two Texas stautes, TEX. REV. CIV. STAT. ANN. art. 235 § G (ii), (iii) (Vernon 1973) (set out in Appendix C) and TEX. REV. CIV. STAT. ANN. art. 4642 (Vernon 1940) (set out in Appendix D), by virtue of the holding

[1] When the Supreme Court of Texas denied Merrill Lynch's application for writ of error with the notation "no reversible error" and denied Merrill Lynch's petition for rehearing of that decision, it issued no full written opinion. Therefore, the opinion of the Texas Court of Appeals (issued February 9, 1984) is the only written opinion before this Court.

that the governing provisions of the Federal Arbitration Act, 9 U.S.C. §§ 2, 3, and 4 (1976) (set out in Appendix E), applied to this state-court suit. That argument is fundamentally erroneous. *See infra* at 16-19. The two Texas statutes in question have to do with certain ancillary proceedings in aid of arbitration and with generalized principles concerning the availabilty of injunctive relief in the Texas courts. Of these two statutes, the former (art. 235 § G) is inapplicabie to this case, and the latter (art. 4642) was complied with by the trial court. Hence, neither statute was invalidated, nor even mentioned, in the Court of Appeals opinion.

Certiorari jurisdiction would also exist under section 1257(3) if an unsuccessful party below drew into question the validity of a state statute and petitioned this Court to strike it down under the supremacy clause, but that is certainly not the case here. Merrill Lynch does not seek to have this Court invalidate any state statutes. Indeed, the essence of Merrill Lynch's position is exactly the opposite; Merrill Lynch argues (erroneously) that the two Texas statutes were implicitly invalidated by the Texas decision below.

Accordingly, no theory that would vest in the Supreme Court jurisdiction over this case under section 1257(3) can withstand scrutiny. Nonetheless, Respondents will now proceed to refute the merits of Merrill Lynch's arguments.

2. The disposition of this case by the Texas courts evinces the universally accepted application of an important body of substantive federal law, the Federal Arbitration Act, 9 U.S.C. §§ 1-14. The employment contract in this case, held by the Texas courts to be governed by that Act's provisions, includes the following agreement, found at paragraph (5):

> I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either

party in accordance with the constitution and rules of the New York Stock Exchange, then in effect.

The arbitration provision was an integral part of Mr. McCollum's employment relationship with Merrill Lynch, essential to the parties' contractual bargain. In it, Merrill Lynch contracted away any right to a judicial determination of any disputes it might have with Mr. McCollum over his employment or its termination, choosing instead arbitration before the New York Stock Exchange as the agreed-upon remedy for any such grievance.[2]

The courts below correctly determined that the federal Act governs the arbitration agreement at issue in this case. Merrill Lynch does not contend to this Court that the employment contract containing the arbitration provision does not involve "commerce" within the meaning of section 1 of the Act, 9 U.S.C. § 1. Indeed, Merrill Lynch's Petition to this Court concedes the arbitrability of its disputes with Respondents and the applicability of

[2] In addition to the arbitration agreement in Mr. McCollum's employment contract, the Constitution and Rules of the New York Stock Exchange, which bind all parties to this case, also mandate arbitration of the dispute underlying this case. The text of the New York Stock Exchange Constitution article VIII, section 1 is set out in Appendix F, and the text of Rule 347 of the Exchange is set out in Appendix G. Membership in the Exchange constitutes a binding contractual agreement with other members of the Exchange and with the Exchange itself for arbitration of disputes within the purview of the relevant arbitration agreements. *E.g., Tullis* v. *Kohlmeyer & Co.*, 551 F.2d 632 (5th Cir. 1977); *Muh* v. *Newburger, Loeb & Co., Inc.*, 540 F.2d 970, 973 (9th Cir. 1976); *Coenen* v. *R.W. Pressprich & Co., Inc.*, 453 F.2d 1209, 1211 (2d Cir 1972), *cert. den.*, 406 U.S. 949; *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766 (S.D.N.Y. 1968). The arbitration apparatus of the New York Stock Exchange is an integral feature of membership in the Exchange, as reflected in the Exchange's form U-4, which Mr. McCollum was required to sign upon commencing his employment with Merrill Lynch, a member firm. That document contains an arbitration provision (set out in Appendix H) substantially identical to the arbitration covenant in the Merrill Lynch employment contract.

9 U.S.C. § 2 (whose text is set out at Appendix D) which provides that the arbitration agreement in this case is "valid, irrevocable, and enforceable."[3] Up to this point, Merrill Lynch's position before this Court is in line with the seminal principles enunciated by this Court in *Southland Corp.* v. *Keating*, ... U.S. ....., 104 S.Ct. 852 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ... U.S. ....., 103 S.Ct. 927 (1983); and *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Those cases establish that the Act promulgates a body of federal substantive law, enacted by Congress in an appropriate exercise of its constitutional power to regulate commerce. Last term, this Court held that that body of federal substantive law also applies to state courts, *Southland Corp.* v. *Keating, supra.* "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.*, 104 S.Ct. at 858. That the substantive federal policy embodied in § 2 of the Act (making arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract") applies in state-court proceedings had also been announced by the Court the preceding term in *Moses H. Cone, supra*, 103 S.Ct. at 941, 942, although arguably as dictum, since it was the federal-court proceeding in that case, rather than the state-court proceeding involving the same parties and issues, under review when this Court rendered its opinion. In the instant case, Merrill Lynch asks this Court to use its already overburdened resources to hear this case and to make a radical

[3] Throughout the course of these proceedings in the Texas courts, however — before the trial court, the Texas Court of Appeals, and the Texas Supreme Court — Merrill Lynch vehemently contested the arbitrabilty of its disputes and the applicability of the federal Act to this case.

departure from such established principles of arbitration jurisprudence.

This Court and numerous lower courts have consistently validated the salutary policy goals of the federal arbitration statute: providing a speedier, less costly alternative to litigation for resoluton of disputes, enabling such disputes to be resolved by experts, and relieving massively congested court dockets. *E.g.*, *Moses H. Cone, supra*; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Dickinson* v. *Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thompson*, 575 F.Supp. 978 (N.D. Fla. 1983). Yet, Merrill Lynch invites this Court to violate that policy by making an illogical and unnecessary holding. Merrill Lynch would have this Court hold that although state courts are bound as a matter of substantive law to enforce arbitration agreements affecting commerce pursuant to section 2 of the federal Act, state courts are nonetheless free to ignore the other provisions of the Act that are inextricably bound up with the substantive law created in section 2: section 3, providing for a judicial stay pending arbitration, and section 4, providing a mechanism to obtain judicial enforcement of a recalcitrant party's obligation to arbitrate. Although Merrill Lynch recognizes that section 2 is binding on state courts, thereby making in state court suits arbitraton agreements affecting commerce "valid, irrevocable and enforceable," that is meaningless if section 3 (judicial stay pending arbitration) and section 4 (order to compel arbitration) are not also binding on state courts. Indeed, this Court has explicitly recognized "Sections 1, 2 and 3 [of the Act] are integral parts of a whole." *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 201 (1956).

It is therefore not surprising that this Court recently noted: "Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act." *Moses H. Cone, supra*, 103 S.Ct. at 942. Even in her dissent to

this Court's holding in *Southland Corp.* v. *Keating*, that § 2 of the Act applies to state courts, Justice O'Connor recognized the logical and legal nexus between § 2 and § 3 and wrote that she perceived the Court's holding that § 2 applies to state courts necessarily meant that § 3 applies as well. 104 S.Ct. at 869 n.20. A footnote to the majority opinion in *Southland* suggested that *Southland* leaves open the question whether sections 3 and 4 of the Act apply to state court proceedings. 104 S.Ct. at 861 n.10. In the case at bar, Merrill Lynch seizes upon that footnote in an effort to advance this case as an appropriate vehicle to resolve that question. M.L. Pet. 7-12. We submit that, although purportedly reserved by this Court in *Southland*,[4] for purposes of this case that question has already been affirmatively answered by the Texas courts. Moreover, even if the question is still viably open, this case is not an appropriate one by which it can be resolved, since Merrill Lynch's claim for injunctive relief in this case is now moot, as established by its own pleadings. *See infra* at 19-20.

The Texas courts, as recognized by the Court of Appeals' opinion below, Appendix A, have already determined that section 3 and section 4 of the Act apply to proceedings in the Texas courts. *White-Weld & Co., Inc.* v. *Mosser*, 587 S.W.2d 485 (Tex. Civ. App. — Dallas 1979, writ ref'd n.r.e.); *Miller* v. *Puritan Fashions Corp.*, 516 S.W.2d 234 (Tex. Civ. App. — Waco 1974, writ ref'd n.r.e.); *Mamlin* v. *Susan Thomas, Inc.*,

[4] One might also argue that the question was already partially answered by this Court, in *Moses H. Cone, supra*, 103 S.Ct. at 942, even before it was "reserved" by this Court in *Southland*. The Court in *Moses H. Cone* recognized that holding section 3 of the Act binding on state courts is an inescapable outgrowth of so holding section 2. That result obtains regardless of whether it is reached, as a conceptual matter, by superimposing substantive federal law on the state courts via the supremacy clause, or by state courts' adoption of section 3 for application in the state courts, thereby making it part of state law.

490 S.W.2d 634 (Tex. Civ. App. — Dallas 1973, no writ).[5] Since the applicability of sections 3 and 4 in the Texas courts is such an engrained point of law, the trial court in the case at bar acted properly, as it was bound to do, in granting the stay pending arbitration and compelling arbitration. Although the Texas courts have adopted the rule as federal substantive law applicable by virtue of the supremacy clause, in so doing, the rule has now become a cardinal principle of substantive Texas state law. *Ipso facto*, the rule is not subject to review by this Court, because state courts speak with final authority on matters of state law. ***Mullaney*** v. ***Wilbur***, 421 U.S. 684, 689 (1975); ***Scripto, Inc.*** v. ***Carson***, 362 U.S. 207, 210 (1960); ***Murdock*** v. ***Memphis***, 20 Wall. 590, 22 L.Ed. 429 (1875). Furthermore, even if the adopted federal law (9 U.S.C. §§ 1, *et seq.*) remains federal rather than state law after its adoption by the state, there still exists in this case more than adequate state grounds upon which the decision of the state court below can be supported: the provisions of the Texas Arbitration Act, TEX. REV. CIV. STAT. ANN. art. 224 *et. seq.* (Vernon 1973 and Supp. 1984), which closely mirror and go even further than the provisions of the federal Act.

3. Although the orders of the trial court in the instant case compelling arbitration and staying the case (Appendix I) and denying a temporary injunction (Appendix J) were silent on whether they were granted pursuant to the federal Act or the state arbitration statutes, such orders were eminently correct under the mandatory provisions of both or either of the federal

---

[5] The cited Texas cases do not stand alone in American jurisprudence. Various decisions of the federal Courts of Appeal also hold that sections 3 and 4 apply with equal force to the state courts as well as the federal courts. ***Merrill Lynch, Pierce, Fenner & Smith, Inc.*** v. ***Haydu***, 637 F.2d 391 (5th Cir. 1981); ***Commercial Metals Co.*** v. ***Balfour, Guthrie and Co., Ltd.***, 577 F.2d 264 (5th Cir. 1978); ***Stokes*** v. ***Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 523 F.2d 433 (7th Cir. 1975).

and the state statutes, which are substantially identical.[6] Texas has enacted comprehensive arbitration legislation that displays to an even greater degree the pro-arbitration policy embodied in the federal Act. The Texas Arbitration Act, whose substantive provisions are not even mentioned in Merrill Lynch's Petition, TEX. REV. CIV. STAT. ANN. arts. 224, *et. seq.*, (Vernon 1973 and Supp. 1984), conclusively forecloses Merrill Lynch's argument that the Texas courts should be free to enforce § 2 of the federal Act by fashioning their own procedural means that differ from their federal counterparts in § 3 and § 4 of the federal Act. M.L. Pet. 8-14. The Texas Act contains even stricter measures than the federal Act regarding the mandatory duty of a Texas trial court, upon proper motion in a case subject to arbitration, to compel arbitration, to order a stay pending arbitration, and not to grant any preliminary injunctive relief. Therefore, in the case *sub judice*, not only did the trial court, as affirmed by the Texas Court of Appeals and the Texas Supreme Court, act in accord with the provisions of the federal Act, it also acted correctly under the corresponding provisions of the Texas Act.

The first portion of the Texas Act tracks the language of section 2 of the federal Act in providing that covered arbitration agreements are "valid, enforceable, and irrevocable, save upon

---

[6] The Texas Court of Appeals decision below, which the Texas Supreme Court refused to review (with the notation "no reversible error"), relies only upon the provisions of the federal Act to affirm the actions of the trial court in compelling arbitration, staying the case, and denying temporary injunctive relief. The same result could have been reached by applying the pertinent provisions of the Texas Act, TEX. REV. CIV. STAT. ANN. arts. 224, *et seq.* (Vernon 1973 and Supp. 1984). The applicability of the Texas Act to this case, though not mentioned in the Court of Appeals opinion, is recognized by Merrill Lynch in its Petition before this Court. In the Petition, Merrill Lynch relies heavily on a section of the Texas Arbitration Act, TEX. REV. CIV. STAT. ANN. art. 235, section G(ii) and (iii), in its argument that the decision below impliedly held that the federal Act pre-empts the operation of that state statutory provision. M.L. Pet. 9.

such grounds as exist at law or in equity for the revocation of any contract." TEX. REV. CIV. STAT. ANN. art 224 (Vernon Supp. 1984) (Appendix K).[7]

The Texas Act, as with § 4 of its federal counterpart, contains a provision authorizing the trial court, upon proper motion, to compel arbitration of an arbitrable dispute. TEX. REV. CIV. STAT. ANN. art. 225, section A (set out at Appendix L).

Furthermore, the language in the Texas Act providing for a mandatory judicial stay pending arbitration, TEX. REV. CIV. STAT. ANN. art. 225, section D (Vernon 1973) (Appendix L), is cast in even more stringent terms than its federal counterpart, § 3 of the federal Act. Whereas the stay provision of § 3 of the federal Act mandates that the trial court "stay the trial of the action until such arbitration has been had", the mandatory stay provided for in the Texas Act at art. 225, section D, includes "[a]ny action or proceeding involving an issue subject to arbitration." Throughout the course of these proceedings, and in its Petition before this Court, Merrill Lynch has argued that the "stay the trial" provision of § 3 of the federal Act does not preclude a trial court from conducting an evidentiary hearing on an application for preliminary injunction and granting an injunction while referring the matter to arbitration, since under Merrill Lynch's theory, a preliminary injunction hearing is not a "trial" and is therefore not subject to stay under section 3. M.L. Pet. 12-13. While that argument is erroneous in its own right, in view of the commanding weight of caselaw authority to the contrary (to be discussed infra at 11-15), the argument is also completely irrelevant for purposes of this case. Regardless of the correct meaning of "stay the trial" found in section 3 of the

[7] Article 224-1 of the Texas statute (arbitration agreement not enforceable unless prominently appearing on first page of contract) does not apply to the case at bar. Article 224-1 became effective on August 27, 1979; Mr. McCollum's employment contracts were signed in January, 1979, and February, 1979.

federal Act, the reach of the mandatory stay provision in the Texas Act is clearly broad enough to embrace temporary injunction hearings, since under the state Act, the trial court must stay not only "trial," but "[a]ny action or proceeding involving an issue subject to arbitration." One could not seriously dispute that a preliminary injunction hearing is a "proceeding" within the terms of art. 225, section D. It is also noteworthy that art. 225, section D, removes any doubt whether the stay of proceedings is to be mandatory or discretionary with the trial court: "When the application [for arbitration] is made in such action or proceedings, the order for arbitration *shall* [emphasis added] include such stay."

The power of the Texas courts to compel arbitration, another matter which Merrill Lynch struggles so vainly to challenge, has already been amply established in Texas caselaw. *Citizens National Bank of Beaumont* v. *Callaway*, 597 S.W.2d 456 (Tex. Civ. App. — Beaumont 1980, writ ref'd n.r.e.); *White-Weld & Co., Inc.* v. *Mosser, supra.*

Accordingly, the decisions of the Texas courts below in the instant case rest on adequate state grounds (the Texas Act and Texas caselaw), even if those state grounds have not been articulated in the trial courts' orders and the Court of Appeals' opinion.

4. This case does not exist in a vacuum. The gravamen of Merrill Lynch's complaint to this Court is the refusal of the trial court (as affirmed by the Texas appellate courts) to conduct an evidentiary hearing on its application for temporary injunction and to enter a drastic injunction order (effectively killing the major portion of Mr. McCollum's livelihood) pending final disposition of the case while referring it to arbitration. The manner in which Merrill Lynch argues the point in its Petition suggests that the denial of injunctive relief in this case constituted a decisional aberration. What Merrill Lynch fails to disclose to this Court is that numerous other courts, federal and state, have

addressed exactly the same arguments now made by Merrill Lynch to this Court, in cases in which Merrill Lynch was a party (seeking injunctive relief against a former Merrill Lynch account executive), and those courts have repeatedly, uniformly, and consistently rejected those arguments! In those cases, factually on all fours with the instant one, the courts have uniformly read the stay provision of the federal Act with a healthy regard for the policy favoring arbitration and have refused to allow temporary injunctive relief, or to entertain applications therefor, because to do so would entangle the courts in the factual merits of the case, to be resolved by the arbitrators. The cases (with citation form, for convenience's sake, shortened from "Merrill Lynch, Pierce, Fenner & Smith, Inc." to "Merrill Lynch") are: *Merrill Lynch* v. *Hovey*, 726 F.2d 1286, 1291-92 (8th Cir. 1984); *Downing* v. *Merrill Lynch*, 725 F.2d 192, 195 (2d Cir. 1984); *Smith* v. *Merrill Lynch*, 575 F.Supp. 904, 905 (N.D. Tex. 1983); *Merrill Lynch* v. *DeCaro*, 577 F. Supp. 616, 622-25 (W.D. Mo. 1983); *Merrill Lynch* v. *Thompson*, 575 F.Supp. 978, 979-80 (N.D. Fla. 1983); *Merrill Lynch* v. *Shubert*, 577 F.Supp. 406 (M.D. Fla. 1983); *Merrill Lynch* v. *Thomson*, 574 F.Supp. 1472, 1478-80 (E.D. Mo. 1983); *Merrill Lynch* v. *deLiniere*, 572 F.Supp. 246 (N.D. Ga. 1983); *Merrill Lynch* v. *Ray*, 439 So.2d 442 (La. 1983); *Merrill Lynch* v. *Maghsoudi*, ... S.W.2d .... (Tex. Civ. App. — Houston [1st Dist.] October 11, 1984); *Scott* v. *Merrill Lynch*, No. 83-1480 (10th Cir. May 12, 1983); *Doom* v. *Merrill Lynch*, No. MO-83-CA-152 (W.D. Tex. Sept. 29, 1983); *Merrill Lynch* v. *Minces*, No. MD-81-CA-74 (W.D. Tex. July 14, 1981); *Merrill Lynch* v *Robinson*, No. H-2537 (E.D. La., September 15, 1980); *Merrill Lynch* v. *Gorman*, No. 83-CV-9151 (Dane County Cir. Ct., Wis. March 8, 1983); *Merrill Lynch* v. *McKiernan*, Index No. 2039/82 (N.Y. Sup. March 6, 1982); *Merrill Lynch* v. *E. F. Hutton & Co., Inc.*, No. 77 20612 NZ (Ingham County Cir. Ct., Mich. August 22, 1977); *Merrill Lynch* v. *Taksler*, No. C-27468-83B (Mercer County Chancery Ct., N. J. Supr.

September 13, 1983); *Merrill Lynch* v. *Bradley*, Equity No. 3104781 (Anne Arundel County Cir. Ct., Md. June 14, 1983); and *Merrill Lynch* v. *Snow*, No. C-83-3688 (Salt Lake County 3d Dist. Ct., Utah May 20, 1983). We urge this Court not to disturb the decision in the case *sub judice*, plainly in line with existing caselaw, in response to Merrill Lynch's invitation to disrupt this clearly delineated and workable body of jurisprudence. Chaotic judicial diseconomy would result from such a wholesale disruption.

The cited Merrill Lynch cases cogently illustrate the purpose of section 3's mandatory stay provision: to further the Act's goal of providing a speedier, less costly means of dispute resolution.[8] To conduct an evidentiary hearing on an application for temporary injunction, which Merrill Lynch contends the trial court below had a mandatory duty to do (M. L. Pet. 9-11, 12-14), would necessarily entangle the trial court in an exhaustive review of the merits of the case, which are to be resolved by the arbitrators. It would be utterly illogical for a statute intended to

---

[8] There are numerous cases outside the context of Merrill Lynch suit *versus* former Merrill Lynch broker which also support the proposition that a trial court is powerless to grant injunctive relief in an arbitrable dispute. *E.g.*, *Jacksonville Bulk Terminals, Inc.* v. *Int'l Longshoremens Assn.*, 457 U.S. 702 (1982); *Buffalo Forge Co.* v. *United Steel Workers*, 428 U.S. 397 (1976); *Haulage Enterprises Corp.* v. *Hempstead Resources Recovery Corp.*, 74 A.D. 2d 863, 426 N.Y.S. 2d 52 (Sup. Ct. App. Div. 1980); *New England Petroleum Corp.* v. *Asiatic Petroleum Corp.*, 82 Misc. 561, 368 N.Y.S. 2d 930 (N.Y. Sup. Ct. 1975); *Meda Int'l, Inc.* v. *Salzman*, 24 A.D. 710, 263 N.Y.S. 2d 12 (Sup. Ct. App. Div. 1965). Merrill Lynch cites to this Court *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1046 (2d Cir. 1972) in the argument that judicial injunctive power exists in an arbitration context. M. L. Pet. 14-15. Since that case turned on the unique nature of the personal services involved and the specific contractual language authorizing temporary injunctive relief as part of the arbitration process, *Erving* has been soundly rejected as authority in other Merrill Lynch cases of exactly the same nature as the one now before this Court. *See Merrill Lynch* v. *Shubert*, *supra*; *Merrill Lynch* v. *DeCaro*, *supra*.

promote speedy, inexpensive resolution of disputes to be interpreted (as Merrill Lynch petitions this Court to construe section 3) to allow the burden, expense, and duplication of conducting a judicial proceeding simultaneously with an arbitration involving the same facts.[9] This Court has written: "Congress's clear intent, in the Arbitration Act [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone, supra*, 103 S.Ct. at 940. Yet, Merrill Lynch seeks to have this Court hold that the trial court in this arbitrable dispute had a mandatory duty to conduct a full-scale injunction hearing, which would necessarily entail an extensive examination into every factual issue (except the calculation of alleged monetary damages) raised in Merrill Lynch's lengthy pleading. To adjudicate Merrill Lynch's application for temporary injunction, the trial court would have to enmesh itself into

[9] Speaking to this point, the court in *Merrill Lynch* v. *Thomson, supra*, observed:

> Proceeding on Merrill Lynch's preliminary injunction motion would deeply involve the court in the factual issues of the case. Such involvement would deny the party seeking arbitration the benefit of its bargain, which is to have the controversy resolved by arbitrators. *** Therefore, the parties should direct their efforts toward presenting the merits of this dispute to the arbitrator rather than diverting their energies and resources to prosecuting and defending a preliminary injunction motion in a district court [citation omitted]. Adding a second layer of adjudication in the courts is improper, unnecessary and wasteful.

475 F.Supp. at 1478-79. Likewise, the court in *Merrill Lynch* v. *DeCaro, supra*, wrote:

> If courts begin to hear and rule on preliminary injunction motions pending arbitration it could expand their role . . . . The merits of an arbitrable dispute are for the arbitrator to decide. A court, however, in ruling on a motion for preliminary injunction must consider the merits of the movant's claims and his chances for success . . . . Congress did not visualize the courts having even this large a role under the arbitration Act. Furthermore, when a court becomes this deeply enmeshed in an arbitrable dispute it is undermining the purpose of the Act.

477 F.Supp. at 624.

the substantive merits of this controversy, in order to determine whether there exists a substantial likelihood for Merrill Lynch's ultimate success on the merits, whether Merrill Lynch is experiencing irreparable harm, whether Merrill Lynch has an adequate remedy at law, whether the balance of equities tips for or against Merrill Lynch, whether Merrill Lynch has unclean hands, whether the public interest would be injured by granting injunctive relief and whether Merrill Lynch is guilty of laches. It defies common sense for Merrill Lynch to argue to this Court that that is a result not inconsistent under the statute with the admitted arbitrability of the disputes at issue. M.L. Pet. 9-11, 12-14.

The New York Stock Exchange arbitrators are fully empowered to grant injunctive as well as monetary relief, as the particular facts of each case may warrant. Also, they are uniquely able to convene a panel on extremely short notice — even as short as one day — if the parties agree to such expedition. In this case, after several postponements obtained by Merrill Lynch pending the disposition of Merrill Lynch's various appeals through the Texas appellate courts, the arbitration hearing has now been set for December 4, 1984.

Despite the availability of injunctive relief from the arbitrators, Merrill Lynch has never requested any such relief, permanent or temporary, from them; indeed, Merrill Lynch has consistently resisted the efforts of Respondents to bring the arbitration on for hearing. It is therefore incomprehensible that Merrill Lynch argues to this Court that it has no forum from which it can seek equitable relief to maintain the status quo pending final arbitration. M. L. Pet. 13. A party should not be heard to complain about the unavailability of a remedy it has not even tried to obtain, especially in a case in which equitable relief is sought, thereby necessitating that such a party act diligently in pursuit of its claimed rights. Had Merrill Lynch acted in this case as it was contractually obligated to, all of its claims for

relief, equitable or monetary, would have been finally resolved on the merits over a year ago by expert arbitrators empowered to grant any and all forms of relief to which Merrill Lynch might be entitled. Instead, Merrill Lynch has persisted in a gigantic litigation campaign, at extraordinary expense and disruption to all parties and in blatant violation of Merrill Lynch's contractual duty to pursue arbitration, a less costly and much speedier alternative to litigation. Merrill Lynch's litigation campaign bears all the markings of harrassment, especially so since Merrill Lynch has repeatedly lost before so many other courts, arguing the same unmeritorious issues it has advanced in this case.

5. Merrill Lynch erroneously argues that the Texas decisions below implicitly held that two Texas statutes are pre-empted by the federal Act, M.L. Pet. 8-12, thereby warranting review by this Court. The two Texas statutes in question are TEX. REV. CIV. STAT. ANN. art. 235 § G (ii), (iii) (Vernon 1973), set out in Appendix C and TEX. REV. CIV. STAT. ANN. art. 4642 (Vernon 1940), set out in Appendix D. The first statute is inapplicable to this case; the second was complied with by the trial court; neither of them was held pre-empted by the federal Act, explicitly or implicitly.

Article 235, section G(ii) and (iii) has been subjected to a tortured misreading by Merrill Lynch in its argument that that statute specifically authorizes temporary injunctive relief pending arbitration. M.L. Pet. 9. A simple reading of the text and context of the statute, which is part of the Texas Arbitration Act, is sufficient to demonstrate that it simply does not so provide. The statute does not even mention injunctive relief in its enumeration of certain ancillary proceedings available "[i]n advance of the institution of any arbitration proceedings, but in aid thereof."[10] Since the case at bar is not a controversy in rem; does not involve attachment, garnishment, or sequestration; and does not involve the potential destruction of the subject matter of the controversy or of books, records, documents, or evidence, the only portion of art. 235, section G, which Merrill Lynch could argue pertains to this case is the portion found at subsection (ii) which provides for pre-arbitration application for an order invoking the jurisdiction of the court over:

> . . . any other ancillary proceeding in the manner by which, and on complying with the conditions under which, such proceedings may be instituted and conducted ancillary to a civil action in a district court . . .

Presumably, that must be the language in the statute which Merrill Lynch has seized upon in arguing: "The Texas legislature has passed a specific statute authorizing such relief" [injunction pending arbitration], M.L. Pet. 9. However, that argument simply does not stand up. The quoted statutory language is not specific at all, but is, instead, a textbook model of the sort of generalized statutory language that must yield to more specific statutory language, as required by Texas statute, TEX. REV. CIV. STAT. ANN. art. 5429b-2, Section 3.06 (Vernon Supp. 1984). The generalized statutory language relied upon by Merrill Lynch cannot possibly mean what Merrill Lynch wishes it to mean (i.e., injunctive relief available in arbitrable case) because the generalized statutory language is contained *in the same statute*, The Texas Arbitration Act, which specifically provides that any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made, and further specifically provides that when the application is made in such action or proceeding, the order for arbitration shall include such stay. TEX. REV. CIV. STAT. ANN. art. 225, section D

[10] Of course, in the proceedings below, Merrill Lynch vigorously contested the arbitrability of the disputes in this case. Merrill Lynch's sudden advocacy before this Court of a statute, which Merrill Lynch has never before cited in any of its voluminous pleadings or briefing in this case, having only to do only with procedures *in aid of* arbitration, is, therefore, highly suspect.

(Appendix L). That very specific provision of the same statute forecloses Merrill Lynch's novel reading of the generalized provisions of it.[11] Therefore Merrill Lynch merely presents a case of misconstruction of a state statute to this Court, and not a case that a state statute has been held pre-empted by federal law.

The same is also true with respect to Merrill Lynch's effort at wishful re-writing of TEX. REV. CIV. STAT. ANN. art. 4246 (Vernon 1940). M.L. Pet. 9. Article 4246, embodying extremely generalized principles about the availability of injunctive relief in the Texas courts, was enacted in 1907, and does not contain the faintest reference to arbitration or mandatory stays of litigation in arbitrable cases. Yet, Merrill Lynch attempts to persuade this Court that that older, generalized statute must be read in a manner displacing the specific provisions of the Texas Arbitration Act, enacted in 1965, which specifically mandate a stay of all judicial proceedings in a case subject to arbitration! Since under TEX. REV. CIV. STAT. ANN. art. 5429-2, section 3.05(a) (Vernon Supp. 1984), if there is any conflict between Texas statutes, the statute latest in date of enactment prevails, Merrill Lynch's bizarre exercise in statutory interpretation of art. 4642 must fail.

Nothing done by the trial court in this case violated art. 4642. That is evident by an examination of the language of the statute itself. *See* Appendix D. In pertinent part, art. 4642 provides that the Texas trial courts shall hear and determine applications for injunctions and *may* grant them where the applicant is entitled to the relief demanded, or where the applicant shows himself entitled to an injunction under the principles of equity and the provisions of Texas statutes relating to the granting of injunctions. Article 4642 merely provides that the court must hear and determine applications for injunctions, not that it must grant

[11] Of course, nowhere in Merrill Lynch's Petition is there any citation or discussion of the substantive provisions of the Texas Arbitration Act, specifically art. 225.

them. In the case at bar, the trial court did hear and determine Merrill Lynch's application (allowing Merrill Lynch to make an offer of proof of its entire case), and in an appropriate exercise of its discretion, denied the requested relief, because overwhelming statutory and case law established that Merrill Lynch was not entitled to such relief. Furthermore, although not stated in the trial court's orders, those orders were also correctly granted under a state statute governing the availability of injunctive relief, TEX. REV. CIV. STAT. ANN. art. 225. It is therefore abundantly clear that the trial court in this case acted in scrupulous accord with the spirit and the letter of art. 4642. There simply is no question of federal pre-emption of art. 4642 presented in this case.

6. Finally, Merrill Lynch's entire claim for injunctive relief has become moot, making this case exceedingly inappropriate for review by this Court. Paragraph 2 of Mr. McCollum's employment contract (the basis of Merrill Lynch's claim for injunctive relief) purports to restrict certain post-termination activities "for a period of one year from the date of termination of my employment." Mr. McCollum terminated his employment with Merrill Lynch on August 9, 1983. Merrill Lynch filed this lawsuit on October 5, 1983, embarking then on a determined frenzy to litigate rather than arbitrate its disputes with Mr. McCollum; that frenzy has not abated yet. Meanwhile, as Merrill Lynch pursued this case up through the trial court, the Texas Court of Appeals, the Texas Supreme Court, and now this Court, protesting loudly (and to date, unsuccessfully) to all of those courts that it must have a judicial forum for determination of the merits of its injunctive claims, those injunctive claims became moot on August 9, 1984! On that date, the one-year term of the covenant regarding post-termination activities expired, so that there is now nothing upon which Merrill Lynch can base a claim for injunctive relief. This is clearly reflected in Merrill Lynch's own pleadings before the trial court, wherein it

prays for an extensively detailed "Temporary Injunction *pending final trial herein, or until August 9, 1984, whichever date comes first,* prohibiting Defendants *for a period up to and including August 9, 1984,* from doing any of those things enumerated under Paragraph 1(a), (b), and (c) of the Prayer herein." Merrill Lynch's Amended Petition at 13 (Paragraph 4) [emphasis added]. Thus, even if Merrill Lynch were entitled to a judicial resolution of its injunctive claims (which it clearly is not, pursuant to the employment contract, the Constitution and Rules of the New York Stock Exchange, and the governing federal and state statutes), no court could grant any relief for such claims, since Merrill Lynch's own pleadings show that such relief cannot be granted. The mooting of the injunctive claims is a direct result of Merrill Lynch's deliberate, obstreperous refusal to arbitrate its disputes with Respondents.

CONCLUSION

This Court lacks certiorari jurisdiction over this case, or, in the alternative, the petition for writ of certiorari should be denied.

Dated: November 9, 1984.

Respectfully submitted,

Mark C. Watler

MARK C. WATLER
WOODARD, HALL & PRIMM
4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that three copies of the above and foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari have been served, in accordance with Rule 28, Rules of the Supreme Court, by placing same in the United States Post Office, Houston, Texas, sent certified mail, return receipt requested and correctly addressed, to Mr. Kenneth E. Johns, Jr., and Mr. Guy S. Lipe, Vinson & Elkins, First City Tower, Houston, Texas 77002, counsel of record for Petitioner, Merrill Lynch, Pierce, Fenner & Smith, Inc., on the 9th day of November, 1984; and that all parties required to be served have been served.

Mark C. Watler

MARK C. WATLER
WOODARD, HALL & PRIMM
4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

APPENDIX A
[Now reported at 666 S.W.2d 604.]

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Appellant,
v.
ERNEST M. MCCOLLUM, and
SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Appellees.

No. B14-83-731CV.

Court of Appeals of Texas,
Houston (14th Dist.).

Feb. 9, 1984.

Rehearing Denied March 8, 1984.

Kelly J. Coghlan, Vinson & Elkins, Houston, for appellant.

Mark C. Watler, Woodard, Hall & Primm, Houston, for appellees.

Before ROBERTSON, SEARS and ELLIS, JJ.

OPINION

ROBERTSON, Justice.

This is appeal from the trial court's: (1) denial of appellant's application for temporary injunction, (2) granting an order compelling arbitration and (3) staying the case pending completion of arbitration. Appellant raises five points of error complaining of the trial court's denying the temporary injunction "as a matter of law, without allowing an evidentiary hearing," considering "unreported and not to be reported case authority," and granting the order to stay the case and compel arbitration since a state court is "not granted the authority under the Federal Arbitration Act to compel arbitration." We affirm.

Appellee, Ernest McCollum ("McCollum"), on or about February 20, 1979, began his employment with appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Both parties signed an Account Executive Training Agreement and Account Executive Agreement, having identical clauses regarding post-employment solicitation of Merrill Lynch clients and post-employment use of books and records of Merrill Lynch. On or about August 9, 1983, McCollum voluntarily terminated his employment with Merrill Lynch and on or about the same day commenced working for appellee Smith Barney, Harris, Upham & Co., Inc., ("Smith Barney"). Merrill Lynch, in its First Amended Original Petition and Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction, brought four "counts:" "Illegal Disclosure and Use of Trade Secrets," "Tortious Interference with Contractual and Business Relations," "Contractual Violations of McCollum," and "Unjust Enrichment." In the body of its petition, Merrill Lynch alleged that McCollum has "contacted Merrill Lynch clients to solicit business and/or the transfer of their accounts from Merrill Lynch to Smith Barney, ... removed and taken records of Merrill Lynch ... in original or in duplicated form and has made use of such records, ... tortiously interfered with the contractual relations between Merrill Lynch and its customers, ... and encouraged and enticed Merrill Lynch brokers and other personnel to breach their employment contracts with Merrill Lynch." Merrill Lynch alleged that Smith Barney had reason to know of the employment agreements and their terms and that Smith Barney encouraged McCollum in his actions.

Four of appellant's points of error concern the trial court's denial of temporary injunctive relief. Merrill Lynch sought a temporary injunction enjoining appellees from further use of confidential information and further solicitation of Merrill Lynch clients. The trial judge, in denying the application, at least in part, relied on the court's finding that all matters pled by

appellant were subject to arbitration. In its first point appellant contends that the trial court erred in finding all matters pled subject to arbitration. We disagree.

First, the trial court had to decide whether an agreement to arbitrate existed, and if so, whether the matters pled by Merrill Lynch came within that agreement. Paragraph 1 & 2 of the Account Executive Agreement prescribe many of the acts which McCollum is accused of committing.

> All records of Merrill Lynch including the names and addresses of the clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after termination for any reason of my employment with Merrill Lynch, and that none of such records nor any part of them is to be removed from the premises of Merrill Lynch either in original form or in duplicated or copied form ...
>
> In the event of termination of my service with Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch whom I served or whose names become known to me while in the employ of Merrill Lynch, or any subsidiary thereof at which I was employed at any time for a period of one year from the date of termination of my employment ..

Paragraph 5 of the same document provides:

> I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party in accordance with the constitution and Rules of the New York Exchange, then in effect.

[1] Merrill Lynch argues that not all of the matters pled are arbitrable since some took place after McCollum terminated his employment with Merrill Lynch and are founded in tort; consequently, they do not come within the parties arbitration agreement which covers controversies "arising out of my employment

or the termination of my employment." It cites *Coudert* v. *Paine Webber Jackson & Curtis*, 705 F.2d 78 (2d Cir. 1983) for this proposition. In *Coudert*, a registered representative sued her former employer brokerage firm claiming defamation, invasion of privacy and intentional infliction of emotional distress. In reversing the trial court, the appellate court held "rather, the dispute itself does not pertain to employment or termination of employment; the tortious acts are all claimed to have occurred after such termination." *Id.*, at 82. Merrill Lynch would have us hold that the *timing* of the alleged controversial acts are determinative of whether the controversy "arises out of employment or termination of employment." We refuse to so hold. We believe *Coudert* should be limited to its facts in that the post-employment controversy concerned tortious conduct alone, not violations of the parties employment agreement such as the case before us. We find support for our position in *Downing* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192 (8th Cir. 1984). "In the present case, the temporal aspect is an inevitable consequence of the contract clause in issue." *Id.*, at 195. We believe the proper approach to be an inquiry as to whether the subject matter of the complaints arose out of the parites employment agreement or termination of employment. The mere timing of the controversial acts should not be controlling. In the case at bar Merrill Lynch argues that the express terms of the employment agreement were violated, but since these alleged violations took place after the employee-employer relationship terminated, the controversy does not arise out of employment or termination of employment. We cannot accept this argument.

Merrill Lynch and Smith Barney are members of the New York Stock Exchange and McCollum is a registered representative of the exchange. There is substantial authority for the proposition that, irrespective of the parties employment agreement as drafted by Merrill Lynch, the constitution and rules of the New York Stock Exchange constitute a part of that employment

agreement given the parties relationship to the exchange. The scope of the arbitration provisions in these rules and the constitution is even broader than the provisions in the Account Executive Training Agreement and Account Executive Agreement entered into by the parties.

> Section 2 of the Arbitration Act, 9 U.S.C. Section 2 (1970), makes enforceable all arbitration agreements concerning transactions relating to commerce . . . Article VIII, Section 1 of the New York Stock Exchange Constitution provides:
>
> Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, . . . shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors.

Coenen v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir. 1972), cert. denied, 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972).

> The constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other and with the exchange itself. . . . Since the rules of the Exchange 'constitute a contract between the members, the arbitration provisions which they embody have contractual validity.' * * * The Exchange provisions requiring arbitration constitute an agreement to arbitrate which is binding upon both [parties].

Brown v. *Gilligan, Will & Co.*, 287 F.Supp. 766, 769-770 (S.D. N.Y. 1968).

The counts and allegations pled by Merrill Lynch are set out in the second paragraph of this opinion. At oral argument, Merrill Lynch argued emphatically that three of the counts were non-arbitrable because they did not "arise out of employment or termination of employment." In "count three" Merrill Lynch

alleged a cause of action against Smith Barney for "unjust enrichment." No authority was cited recognizing unjust enrichment as a cause of action and our research has yielded none. Quantum meruit is recognized as a cause of action designed to prevent unjust enrichment. Even if "unjust enrichment" were a cause of action we believe it would come within the scope of the constitution and rules of the New York Stock Exchange. Merrill Lynch has not seriously contended that the constitution and rules of the New York Stock Exchange are not applicable to the controversy before us. The trial judge found all the matters pled subject to arbitration. He did not articulate whether he believed them arbitrable pursuant to the parties agreement or the constitution and rules of the New York Stock Exchange. Thus given the applicability of the parties Account Executive Agreement, Account Executive Training Agreement and the rules and constitution of the New York Stock Exchange (particularly Article VIII), we hold that the trial judge did not abuse his discretion in determining that each count pled by Merrill Lynch was subject to arbitration. We find support for our decision in the following cases; *Wichmann* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 726 F.2d 1286 (8th Cir. 1984), *Downing* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192 (2nd Circuit 1984), *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thompson, et al.*, 574 F.Supp. 1372 (E.D. Mo. 1983). *Smith* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F.Supp. 904 (N.D. Tex. 1983) (order denying preliminary injunction). Appellant's first point of error is overruled.

[2-4] In its second and fifth points of error, Merrill Lynch claims the trial court erred in denying its application for temporary injunction because the trial court believed it was without legal authority to issue a temporary injunction. At oral argument both parties argued the issue as to whether the trial judge

was correct in denying Merrill Lynch's application for temporary injunction *pending arbitration*. The record shows that Merrill Lynch prayed for "a Temporary Injunction pending final trial herein, or until August 9, 1984, whichever date comes first . . . That the Court upon final hearing, make permanent the temporary Injunction. . . ." *A temporary injunction pending arbitration was never prayed for by Merrill Lynch*, either in the alternative or by amended petition, thus we question whether the issue is properly before us on appeal. Obviously, the trial court could not grant relief not prayed for. However, in light of the fact the trial court in its Order Denying Temporary Injunction stated "this Court therefore lacks authority to grant a temporary injunction pending arbitration," we will address the issue. The Federal Arbitration Act, 9 U.S.C. §§ 3-4 (1976), is instructive in this matter.

> § 3. Stay of proceedings where issue therein referable to arbitration.
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
>
> § 4
>
> . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

The statute's terms are mandatory and the policy behind having arbitration policy in the first place is that once the arbitration procedure is started it should be speedy and not subject to delay

and obstruction in the courts. *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed. 2d 1270 (1967). At oral argument, appellant strenuously defended his position that the language in § 3 "stay the trial" should not be read so as to prevent a trial court from conducting an evidentiary hearing for the purposes of ruling on an application for temporary injunction. We are unpersuaded that such a narrow reading of the word "trial" was intended. As we read the statute, the trial court is obliged to conduct a very narrow two step inquiry. First, it must determine whether a written agreement to arbitrate the subject matter of the present dispute exists between the parties. Second, if such an agreement exists, the court then addresses the question of whether the agreement has been breached. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ... U.S. ...., 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). See also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thompson, et al.*, 574 F.Supp. 1472 (E.D. Mo. 1983). While we are not bound by the decisions of the United States District Courts or even the United States Courts of Appeal, we have read numerous recent opinions in these courts which have dealt with issues similar if not exactly the same as those before us. In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *DeCaro*, 577 F.Supp. 616 (W.D. Mo. 1983) the court was presented with the issue of "whether the language, 'shall . . . stay the trial of action,' contained in section three, is limited only to a trial on the merits or whether it prohibits all further proceedings before the Court." Merrill Lynch argued in that case as it did before the trial judge here and continues to argue to us that if a temporary injunction is not entered nothing will be left to arbitrate. In denying the application for temporary injunction without an evidentiary hearing, the court in *DeCaro* remarked

> The merits of an arbitrable dispute are for the arbitrator to decide. A court, however, in ruling on a motion for preliminary injunction must consider the merits of the movant's

> claim and his chances for success. The Court's findings in this regard along with findings in relation to the other factors to be considered would be cited by the parties and could interfere with the arbitrator's independent determination of the issues.

See also *Wichmann* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 726 F.2d 1286 (8th Cir. 1984). We agree with the reasoning contained in the above cases. The trial court was correct in denying Merrill Lynch's application for temporary injunction without conducting an evidentiary hearing. Appellant's second and fifth points of error are overruled.

[5] Merrill Lynch, in its fourth point of error, contends the trial court was without authority under the Federal Arbitration Act to compel arbitration. While the statute does not by name authorize the state courts to enforce its provisions, Texas courts have enforced arbitration agreements falling within the Federal Arbitration Act. *White-Weld & Company, Inc.* v. *Mosser*, 587 S.W.2d 485, 488 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), *Miller* v. *Puritan Fashions Corp.*, 516 S.W.2d 234 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e), *Mamlin* v. *Susan Thomas, Inc.* 490 S.W.2d 634, 637 (Tex. Civ. App.—Dallas 1973, no writ).

Merrill Lynch's argument has been raised and rejected in other jurisdictions as well. *In Episcopal Housing Corp.* v. *Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647, 652 (1977) the Supreme Court of South Carolina made the following disposition:

> Accordingly, the petition of the plaintiff EHC to enjoin further proceedings in arbitration are denied, and the temporary stays against further proceedings in arbitration are dissolved. The petitions of both Lafaye and McCrory to proceed with arbitration are granted, . . . and all further proceedings in this court are stayed until arbitration is ended.

The court held the Federal Arbitration Act superceded South Carolina common law and was enforceable in the state courts. In *Youmans* v. *Dist. Ct. In & For City of Denver*, 197 Colo. 28, 589 P.2d 487, 488 (1979) the Colorado Supreme Court sitting en banc made the following decision:

> The question before us is whether a member of the NYSE can compel a non-member registered representative of the NYSE to arbitrate a controversy between them arising out of the employment or termination of employment of the registered representative by the member. We answer affirmatively.

See also *Main* v. *Merrill Lynch Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378, 380-381 (1977). We note that the United States Supreme Court has not expressly resolved the question. In *Southland Corp*, v. *Keating*, ... U.S. ..., 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the court reversed the Supreme Court of California and held that the Federal Arbitration Act preempted a state law withdrawing the power to enforce arbitration agreements. It is clear that the issue of arbitrability is governed by a body of substantive federal law applicable in both state and federal court. "Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act. It is less clear however, whether the same is true of an order to compel arbitration under § 4 of the Act." *Moses E Cone Memorial Hosp.* v. *Mercury Construction Corp.*, ...U.S...., 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). While the United States Supreme Court has yet to be presented with a fact situation requiring it to expressly hold that § 4 applies to state court proceedings, we believe it would be illogical to have a court empowered to deny injunctive relief and grant stays of litigation, yet be powerless to compel arbitration. We hold that the trial court had the power to compel arbitration under the Federal Act. Point of error number four is overruled.

[6] In its third point of error, Merrill Lynch complains of the trial court's "considering unreported case authority for its

legal conclusions and authority, and in allowing appellees to cite such authority." Tex. R. Civ. P. 452(f), the applicable rule, provides: "Unpublished opinions shall not be cited as authority by counsel or by a court." The rule is silent as to whether it is intended to prohibit citations to all unpublished opinions or only unpublished opinions of the courts of appeals. The rule is contained in Part III, Rules of Procedure for the Courts of Civil Appeal. We note there is no such corresponding federal rule. The rule is also silent as to the appropriate sanction for a violation. In *Berry* v. *Berry*, 647 S.W.2d 945, 947 (Tex. 1983), the Texas Supreme Court stated: "Part II, the unpublished portion of the opinion, is of no precedential value and should not be cited." We assume the court there simply refused to consider the unpublished opinion. In the case before us, although unreported (and not to be reported) case authority was cited, we find no evidence that the trial court in any way based its decision or even considered the unreported cases cited. Merrill Lynch's third point of error is overruled.

The judgment of the trial court is affirmed.

APPENDIX B

28 U.S.C. § 1257(3) (1976).

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX C

Texas Arbitration Act
TEX. REV. CIV. STAT. ANN. art. 235, Section G(ii) and (iii) (Vernon 1973).

Art. 235. Applications to courts and the effect thereof; court proceedings on applications to courts; venue thereof; stay of proceedings in another court pursuant to a later application; what the court may require that an application contain; when applications may be filed in advance of or pending or at or after the conclusion of arbitration proceedings; acquisition of jurisdiction over adverse parties by service of process or in rem by ancillary proceedings; court relief in aid of pending or prospective arbitration proceedings or the enforcement of court orders or decrees or satisfaction of court judgments; court hearings on applications

. . . .

Sec. G. In advance of the institution of any arbitration proceedings, but in aid thereof, an application may be filed for order or orders to be entered by the court, including but not limited to applications: . . . (ii) invoking the jurisdiction of the court over the controversy in rem, by attachment, garnishment, sequestration, or any other ancillary proceeding in the manner in which, and on complying with the conditions under which, such proceedings may be instituted and conducted ancillary to a civil action in a district court; or (iii) seeking to restrain or enjoin the destruction of the subject matter of the controversy or any essential part thereof, or the destruction or alteration of books, records, documents, or evidence needed for the arbitration proceeding, or seeking from the court in its discretion, order for deposition or depositions needed in advance of the commencement of the arbitration proceedings for discovery, for perpetuation of testimony or for evidence; . . . .

APPENDIX D
Tex. Rev. Civ. Stat. Ann, art. 4642 (Vernon 1940).

Article 4642. 4643, 2989 Grounds for

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.
2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.
3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.
4. Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. Acts 1907, p. 206; Acts 1909, p.354; Const., Art 5, secs. 8, 16.

APPENDIX E
Federal Arbitration Act
9 U.S.C. §§ 2, 3, and 4 (1976).

Title 9 — Arbitration, United States Code

§ 2 Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. if the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the

parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

APPENDIX F
New York Stock Exchange Constitution

Article VIII, Section 1.

Any controversy between parties who are members, allied members, member firms, or member corporations, and any controversy between a non-member and member or allied member and member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, or the dissolution of a member firm, or a member corporation, shall at the instance of any such party be submitted for arbitration, in accordance with the provisions of the Constitution and the Rules of the Board of Directors.

APPENDIX G
New York Stock Exchange Rule 347.

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure described elsewhere in these Rules.

APPENDIX H
New York Stock Exchange Form U-4.

* * *

I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure described in the Constitution and Rules then obtaining of the New York Stock Exchange, Inc.

* * *

APPENDIX I

NO. 83-61472
IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
333RD JUDICIAL DISTRICT
MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC.
v.
ERNEST M. McCOLLUM AND
SMITH BARNEY, HARRIS UPHAM &
COMPANY, INC.

ORDER COMPELLING ARBITRATION
AND STAYING CASE

BE IT REMEMBERED that on October 25, 1983, came on for hearing Defendant's Plea in Abatement and Motion to Compel Arbitration. The Court, after considering the Motion, the arguments of counsel, the pleadings, and all documents on file, is of the opinion that all of the matters in Plaintiff's pleadings are matters that must be arbitrated and are matters which this Court therefore has no authority to decide, and that all further proceedings in this action must be stayed pending arbitration.

It is therefore,

ORDER, ADJUDGED and DECREED that the parties hereto are compelled to arbitrate the disputes existing between them that are contained in the pleadings on file in this case. It is further,

ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause is hereby stayed pending arbitration.

SIGNED this 31st day of Oct., 1983.

/s/ DAVIE WILSON
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:
WOODARD, HALL & PRIMM
By: /s/ MARK C. WATLER
Mark C. Watler
Texas Bar No. 20931300
4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

APPROVED AS TO FORM ONLY:
VINSON & ELKINS
By: ....
Mr. Kelly J. Coghlan
Texas Bar No. 04506300
3215 First City Tower
Houston, Texas 77002
(713) 651-2796

APPENDIX J

NO. 83-61472

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
333RD JUDICIAL DISTRICT

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM AND
SMITH BARNEY, HARRIS UPHAM
& COMPANY, INC.

ORDER DENYING TEMPORARY INJUNCTION

BE IT REMEMBERED that the 25th day of October, 1983, came on for hearing Plaintiff's Application of Temporary Injunction. Due notice having been given, and all parties having appeared by and through counsel, the Court convened the hearing, and Plaintiff and Defendants announced ready. At such time and prior to any evidence being presented, the Court announced that after reading the briefs and examining all of the pleadings and other documents on file, the Court was of the opinion that all of the matters contained in Plaintiff's First Amended Original Petition and Plaintiff's First Supplemental Petition to Plaintiff's First Amended Petition were subject to arbitration and, therefore, as a matter of law, the Court must deny Plaintiff's Application for Temporary Injunction, notwithstanding any evidence that might have been presented at the temporary injunction hearing, and the Court hereby so holds.

Immediately after the Court's announcement, Plaintiff moved to put on evidence in support of Plaintiff's Application for a Temporary Injunction. The Court denied Plaintiff's motion to go forward with evidence. The Plaintiff's counsel was allowed to make an offer of proof pursuant to Rule 103, Texas Rules of Evidence, as to what the testimony would have been had the Court allowed Plaintiff's evidence. The Court is of the opinion,

and so holds, that if the Plaintiff's evidence at the temporary injunction hearing had been in accordance with Plaintiff's offer of proof, Plaintiff would have thereby made a prima facie case for the issuance of a temporary injunction. Even if Plaintiff had demonstrated by actual evidence all elements normally necessary to support the issuance of a temporary injunction, the Court nevertheless could not issue a temporary injunction under the Court's holding that all matters at issue in this action are subject to arbitration. The Court announced at the hearing and so holds that as a matter of law all of the actions brought by Plaintiff against Ernest M. McCollum and Smith Barney, Harris Upham & Company, Inc. are subject to arbitration, and this Court therefore lacks authority to grant a temporary injunction pending arbitration.

It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff's Application for a Temporary Injunction is denied.

SIGNED this 25th day of October, 1983. 2:14 p.m.

/s/ DAVIE WILSON
Judge Presiding

APPENDIX K

Texas Arbitration Act

Tex. Rev. Civ. Stat. Ann. art. 224 (Vernon Supp. 1984).

Art. 224. Validity of arbitration agreements

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A court shall refuse to enforce an agreement or contract provision to submit a controversy to arbitration if the court finds it was unconscionable at the time the agreement or contract was made.

* * *

APPENDIX L

Texas Arbitration Act

Tex. Rev. Civ. Stat. Ann. art. 225 (Vernon 1973)

Art 225. Proceedings to compel or stay arbitrations

Sec. A. On application of a party showing an agreement described in Article 224 of this Act, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

Sec. B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

Sec. C. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under Section A of Article 234 of this Act, the application shall be made therein. Otherwise and subject to Article 235 of this Act, the application may be made in any court of comptent jurisdiction.

Sec. D. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under the provisions of this Article 225, or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Sec. E. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

Acts 1965, 59th Leg., p. 1593, ch. 689, § 1, eff. Jan. 1, 1966.

(3)

NO. 84-629

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

ERNEST M. McCOLLUM, and
SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Respondents.

On Writ Of Certiorari
To The Supreme Court Of Texas

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3213 First City Tower
Houston, Texas 77002
(713) 651-2628

Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith, Inc.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

21PP

QUESTIONS PRESENTED

1. DOES SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, WHICH SETS OUT PROCEDURES FOR ENFORCEMENT OF THE FEDERAL SUBSTANTIVE RIGHTS CREATED BY THE ACT, APPLY IN THIS STATE COURT PROCEEDING?

2. IF SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, IS NOT APPLICABLE IN THIS PROCEEDING, DOES THE PROCEDURE PROVIDED FOR BY TEXAS LAW IN ENFORCING ARBITRATION AGREEMENTS INSOFAR AS THAT PROCEDURE MAKES AVAILABLE TEMPORARY INJUNCTIVE RELIEF PENDING ARBITRATION VIOLATE THE FEDERAL SUBSTANTIVE POLICIES UNDERLYING THE ACT?

3. IF SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, IS APPLICABLE IN THIS PROCEEDING, DID THE COURTS BELOW PROPERLY CONSTRUE SECTION 3 OF THE ACT TO PRECLUDE ISSUANCE BY THE TRIAL COURT OF A TEMPORARY INJUNCTION PENDING ARBITRATION OF THE ISSUES IN DISPUTE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-629

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

ERNEST M. McCOLLUM, and
SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Respondents.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Merrill Lynch, Pierce, Fenner & Smith, Inc.,[1] the petitioner herein, respectfully submits this its Reply Brief to Respondents' Brief in Opposition to Petition for Writ of Certiorari filed herein.

---

1. Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. is a corporation whose parent company is Merrill Lynch & Co., Inc., and which has no affiliates or subsidiaries, except wholly owned affiliates or subsidiaries.

1. Jurisdiction Under 28 U.S.C. § 1257(3)

Respondents question whether this Court has jurisdiction to issue a Writ of Certiorari to review this case under 28 U.S.C. § 1257(3). Respondents arguments, however, ignore this Court's previous opinions construing this statute.

Petitioner argues in this case that the Texas courts have improperly applied Section 3 of the Federal Arbitration Act to the facts of this case, or in the alternative, that the Texas courts have misconstrued Section 3. This Court has recognized its certiorari jurisdiction in cases where the question of the applicability of a federal statute to the facts of the case is in issue. *See Fischer v. Pauline Oil & Gas Co.,* 309 U.S. 294, 295-6 (1940); *see also* 12 Moore's Federal Practice ¶513.01 (2d ed. 1981). This Court has also recognized that a question concerning the proper interpretation of federal law is a proper subject of review on certiorari under 28 U.S.C. § 1257(3). *See Kulko v. Superior Court of California in and for City and County of San Francisco,* 436 U.S. 84, 90, fn.4 (1978). Accordingly, this Court has jurisdiction to review this case under 28 U.S.C. § 1257(3).

2. Independent and Adequate State Grounds

Respondent argues that an adequate and independent state ground exists for the decision below. These arguments are based on Respondents' construction of the Texas General Arbitration Act, Tex. Rev. Civ. Stat. Ann. art. 224 *et seq.* (Vernon 1973 and Supp. 1984). Respondents construe that statute to withdraw the power of a Texas trial court to issue a temporary injunction pending arbitration, independent of Section 3 of the Federal Arbitration Act.

The short answer to Respondents' arguments in this regard is that the "plain statement" rule enunciated by this Court in *Michigan v. Long,* ____U.S.____, 103 S.Ct. 3469, 3475 (1983) for determining whether an independent and adequate state ground exists, has not been satisfied in this case. *Long* requires that the adequacy and independence of any possible state law ground for the decision be made clear from the face of the state court's opinion. *Id.* at 3475. In the case *sub judice,* the decision below rested solely on the court's interpretation of the Federal Arbitration Act, and there is no indication whatsoever from the opinion rendered that the court was relying on any independent and adequate state ground for its decision.[2] In fact, Respondents admit in their Brief in Opposition filed herein that the asserted "state grounds have not been articulated in the trial courts' orders and the Court of Appeals' opinion."[3] There is no independent and adequate state ground for the decision below under the test enunciated by this Court in *Long.*

Even if a *possible* independent and adequate state ground was sufficient to remove this Court's jurisdiction, there is no such possible ground in this case. Tex. Rev. Civ. Stat. Ann. art. 235(G) was added by the drafters of the Texas General Arbitration Act for the express purpose of making certain that the Texas courts retained their equitable powers in connection with arbitrable disputes. Carrington, *The 1965 General Arbitration Statute of Texas,* 20 Sw. L.J. 21, 30 (1966). Article 235(G) of the Texas Act is a supplement to Article 225 of that Act, and is not displaced by Article 225 as contended

2. *See* Appendix B to Petition for Writ of Certiorari.

3. Respondents' Brief at 11.

by Respondents. Respondents' construction of the Texas statute would make Article 235(G) meaningless.

Although many additional arguments could be advanced in response to Respondents' contentions concerning the proper interpretation of the Texas General Arbitration Act, Petitioner is unable to do so in this Reply Brief due to space limitations.

3. Mootness

Respondent argues that because Petitioner requested injunctive relief only through August 9, 1984, its claim for such relief is now moot. Petitioner's claim for relief is so limited because the contractual provision at issue in this dispute (which prohibits certain post-employment activities by Respondent McCollum) only applies for a period of one year after termination. This contractual provision is a standard provision which appears in the employment contracts of hundreds of other account executives employed by Petitioner nationwide.

Petitioner respectfully submits that this case is "capable of repetition, yet evading review," and therefore falls within an established exception to the mootness doctrine. As stated by this Court in *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975), the "capable of repetition, yet evading review" doctrine is applicable where two elements combine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." With respect to the first element, due to the fact that the contractual limitation on Respondent McCollum's activities was limited to a one year

period beginning on the date of his termination of employment with Petitioner, the trial court's decision whether or not to grant injunctive relief has no practical effect beyond the one year contractual period. Because denial by the trial court in the case *sub judice* would not affect either Petitioner or Respondents beyond this one year period, and because the one year period is too short to complete judicial review of the issues presented to this Court in this case, the first element of the *Weinstein* test is satisfied.

With respect to the second element, there is more than a "reasonable expectation" that Petitioner will be subjected to the same action again. In fact, a case involving the same fact situation and identical legal issues is currently pending in the First Court of Appeals of Texas, styled *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Maghsoudi,* No. 01-84-00153-CV. Although that case is still pending on rehearing, the Court of Appeals has rendered an opinion on the original hearing holding that the decision of the state courts in the case *sub judice* is controlling on the question whether a trial court has the power to issue temporary injunctive relief pending arbitration.[4] Furthermore, it is reasonable to expect that the same fact situation and issues will arise again, as the contracts of hundreds of account executives employed by Petitioner have the same contractual provisions as the contract involved in this case. There is "a reasonable expectation that [Petitioner will] be subjected to the same action again," and both elements of the "capable of repetition, yet evading review" exception to the mootness doctrine are present in this case. *Cf. Moore v. Ogilvie,* 394 U.S. 814 (1969).

4. *See* Appendix A hereto.

4. The Merits

Although Respondents' Brief in Opposition is limited primarily to the jurisdictional arguments replied to above, Respondents also have attempted to respond to the Petition for Writ of Certiorari on the merits.

With respect to the issue of the applicability of Section 3 of the Federal Arbitration Act in state court proceedings, Respondents argue that Section 2 of the Act, which this Court in *Southland Corp. v. Keating,* ___U.S.___, 104 S.Ct. 852 (1984) held to create federal substantive rights applicable in both state and federal courts, would be "meaningless" if Section 3 of the Act is not applicable in state courts.[5] The fallacy in this argument, however, is demonstrated by Respondents themselves, as they state in their Brief in Opposition (in connection with their independent and adequate state ground arguments) that the Texas procedures for enforcement of arbitration agreements are even more protective of the substantive rights created by Section 2 than is Section 3.[6] While this argument erroneously construes Texas law to prevent temporary injunctive relief pending arbitration, it illustrates that state procedure *can* be used to enforce arbitration agreements and adequately protect the federal substantive rights created by Section 2 of the Act. While it is true that this Court stated in *Bernhardt v. Polygraphic Company of America,* 350 U.S. 198, 201 (1956) that "Sections 1, 2 and 3 [of the Act] are integral parts of a whole," this was simply a recognition that federal rights have no meaning unless there is a means for vindication of those rights. State procedural law, equally as well as federal

5. Respondents' Brief at 6.

6. Respondents' Brief at 10.

procedural law, can provide the means for vindication of the substantive rights created in Section 2 of the Act.

Respondents also cite numerous cases in which Petitioner was a party which Respondents assert have rejected the arguments asserted by Petitioner herein.[7] While it is true that the federal court cases cited by Respondents have rejected Petitioner's interpretation of Section 3, none of those cases are from courts in the Seventh or Second Circuits, which have held that temporary injunctive relief is available pending arbitration. *See Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064 (2d Cir. 1972); *Sauer-Getriebe KG v. White Hydraulics, Inc.,* 715 F.2d 348 (7th Cir. 1983). With respect to the state court cases cited by Respondents, all but two of those cases are merely unreported state trial court orders. These unreported orders either (1) state no basis for the order, (2) rely on Section 3 of the Act, or (3) rely on particular state procedural rules for rejection of the temporary injunctive relief requested. None of these cases address the question whether *Texas* law allows temporary injunctive relief pending arbitration, or whether such relief impairs the substantive rights created by Section 2 of the Act. Furthermore, these cases illustrate the confusion which currently exists in the state courts as to the proper procedural law to be applied.

Of the two reported state cases cited by Respondents, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ray,* 439 So.2d 442 (La. 1983), is merely a summary affirmance without opinion of an unreported trial court order denying a temporary injunction based on Section 3 of the Act. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Maghsoudi,* ___S.W.2d___ (Tex. App.—Houston [1st Dist.] Octo-

7. Respondents' Brief at 12-13.

ber 11, 1984), which is still pending on rehearing, merely follows the decision of the lower courts in the case *sub judice*.[8] Respondent understandably fails to cite *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court, City and County of Denver,* 672 P.2d 1015 (Colo. 1983), in which the Colorado Supreme Court held, in a case indistinguishable from the case at bar, that temporary injunctive relief pending arbitration is available.

As can be seen, there is no "clearly delineated and workable body of jurisprudence"[9] which would be disrupted if this Court sustained Petitioner's arguments herein, and no "chaotic judicial diseconomy"[10] would result therefrom.

Respondents also argue that temporary injunctive relief pending arbitration is inconsistent with the Congressional purpose in enacting Section 3 of the Federal Arbitration Act.[11] Respondents point to the statement in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* ___ U.S.___, 103 S.Ct. 927, 940 (1983) that "Congress' clear intent in the Arbitration Act [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."

Petitioner has two responses to this argument. First, the availability of temporary injunctive relief pending arbitration does not stand as a significant obstacle to Congress' purpose to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." Upon a determination of arbitrability,

8. *See* Appendix A hereto.

9. Respondents' Brief at 13.

10. Respondents' Brief at 13.

11. Respondents' Brief at 13.

the court action is stayed and cannot proceed to final resolution in the trial court. The trial court would merely retain jurisdiction to issue orders in aid of the arbitration, including the power to issue temporary injunctive relief pending final resolution of the dispute in arbitration, to preserve the status quo and prevent irreparable harm, which harm could not be compensated for by way of damages in arbitration. The temporary injunction hearing, by its very nature, is an expedited proceeding, and would not result in significant delay in the parties' moving out of court and into arbitration for all purposes.

Nevertheless, even if the availability of temporary injunctive relief pending arbitration was inconsistent with Congress' purpose behind Section 3 of the Act, that purpose is not relevant to the determination whether *Texas* procedures, which allow temporary injunctive relief pending arbitration, impair the *substantive* rights created in Section 2 of the Act. It is clear, and Respondents admit,[12] that the Congressional intent to move the parties out of court and into arbitration as quickly as possible is the intent behind *Section 3* of the Act. Section 3 is a procedural provision which pursuant to Congress' express mandate applies only in the federal courts. *See Southland Corp. v. Keating,* 104 S.Ct. at 868 (O'Connor, J., dissenting). Because Section 3 of the Federal Arbitration Act is merely a procedural provision which has no application in the state courts, the Congressional purpose behind Section 3 is simply irrelevant to the determination whether the Texas procedures making available temporary injunctive relief pending arbitration impair the *substantive* rights created in Section 2 of the Act.

12. Respondents' Brief at 13.

Contrary to Respondents' assertions, Petitioner does not ask this Court "to make a radical departure from [the] established principles of arbitration jurisprudence"[13] established by this Court in *Southland* and *Moses H. Cone.* Petitioner merely asks this Court to address the question reserved in *Southland* whether Section 3 of the Federal Arbitration Act applies in state court proceedings and to resolve the uncertainty and confusion currently existing in the courts concerning the availability of temporary injunctive relief pending final resolution *in arbitration* of a dispute arbitrable under the Federal Arbitration Act.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Writ of Certiorari previously filed herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Kenneth E. Johns Jr.

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3213 First City Tower
Houston, Texas 77002-6760
(713) 651-2628

November 19, 1984

13. Respondents' Brief at 5-6.

CERTIFICATE OF SERVICE

I, Kenneth E. Johns, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Merril Lynch, Pierce, Fenner & Smith, Inc., Petitioner herein, hereby certify that on November ____, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the above and foregoing Petitioner's Reply Brief in response to Respondents' Brief in Opposition to Petition For Writ Of Certiorari To The Supreme Court Of Texas on each of the parties herein, as follows:

On Ernest M. McCollum and Smith Barney, Harris, Upham & Co., Inc., Respondents herein, by depositing such copies in the United States Post Office, Houston, Texas, with first class postage prepaid, properly addressed to the post office address of Mark C. Watler, the above-named Respondents' counsel of record, at Woodard, Hall & Primm, 4700 Texas Commerce Tower, Houston, Texas 77002.

All parties required to be served have been served.

Dated November 19, 1984.

Kenneth E. Johns Jr.

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3213 First City Tower
Houston, Texas 77002-6760
(713) 651-2628

APPENDIX A

COURT OF APPEALS
First Supreme Judicial District

No. 01-84-0153-CV

MERRILL LYNCH, PIERCE, FENNER AND SMITH,
Appellant

v.

ABRAHAM MAGHSOUDI AND
PRUDENTIAL-BACHE SECURITIES, INC.,
Appellees

On Appeal from the 281st Judicial District Court
of Harris County, Texas
Trial Court Cause No. 84-99663

OPINION

Merrill Lynch, Pierce, Fenner and Smith sued Abraham Maghsoudi and Prudential-Bache Securities, Inc., seeking damages and injunctive relief under theories of: (1) breach of contract, (2) illegal use of appellant's trade secrets, (3) tortious interference with contractual and business relations, (4) unjust enrichment, and (5) conspiracy. Upon the defendant's motion, the trial court entered an order staying trial proceedings, ordering arbitration, and denying Merrill Lynch's request for injunctive relief. Merrill Lynch appeals these actions.

The defendant Maghsoudi was formerly employed by Merrill Lynch as an account executive. At the time he was hired, he signed a contract in which he agreed that, in the event of his termination, he would not remove the originals or copies of Merrill Lynch's records and would not, for a period of one year thereafter, solicit its cus-

tomers he had come to know while in its employ. The contract also contained the following provision relating to arbitration of disputes:

> I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment, with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party in accordance with the Constitution and Rules of the New York Stock Exchange, then in effect.

Maghsoudi subsequently resigned from Merrill Lynch and began working for Prudential-Bache. Merrill Lynch's petition alleges that Maghsoudi solicited its customers and removed its records in contravention of the employment contract and that these acts were done with the knowledge and encouragement of Prudential-Bache.

The trial court denied appellant's requested relief and ordered the parties to proceed to arbitration on the basis of the Federal Arbitration Act, 9 U.S.C. (1976). Sections 3 and 4 of that Act provide:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Merrill Lynch brings twelve points of error, making arguments that were recently urged and rejected in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum,* 666 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1984, wrti ref'd n.r.e.). These arguments were squarely presented to the Texas Supreme Court in Merrill Lynch's application for writ of error, and that court refused to grant that writ, finding no reversible error. We thus are strongly inclined to follow the *McCollum* decision unless it may be distinguished. *See Culver v. State,* 85 S.W.2d 997 (Tex. Civ. App.—El Paso 1935, no writ).

On oral submission, Merrill Lynch argues that we should not follow the *McCollum* decision because it is still pending on motion for rehearing in the Texas Supreme Court. Merrill Lynch also argues that *McCollum* should be distinguished from the instant case because in *McCollum,* Merrill Lynch made only an "offer of proof", and did not make a full presentation of evidence as it did in the case at bar. Thus, Merrill Lynch asserts that the Texas Supreme Court's denial of its application in *McCollum* could have been predicated upon a finding that the record did not present an adequate evidentiary basis for a review of its points of error.

We disagree with this argument. Under section 3 of the Federal Arbitration Act, the trial court must determine whether the issues presented are "referable to arbitration under the agreement to arbitrate." Absent some showing that the allegations of the suit have been cast in bad faith, this determination is properly made without con-

ducting an evidentiary hearing. *McCollum*, 666 S.W.2d 604.

Merrill Lynch also asserts that important policy considerations require this court to refuse to follow the holding in *McCollum*. Principally, Merrill Lynch urges that the *McCollum* decision, and other authorities to the same effect, will have a disastrous impact on the enforceability of protective covenants, because they will create a void during the period pending arbitration in which the party seeking to enforce the agreement will be denied any effective relief. We have noted, particularly on oral argument, that the parties are in substantial disagreement about the time required to obtain arbitration under the Act and also about preventative remedies that are available during the period pending arbitration. These same policy considerations were presented in *McCollum*, and we find no reason to rule contrary to that decision.

The judgment of the trial court is affirmed.

/s/ FRED V. KLINGEMAN
Fred V. Klingeman
Associate Justice (Retired)

Chief Justice Evans and Associate Justice Warren also sitting.

For Publication.

JUDGMENT RENDERED AND OPINION DELIVERED OCTOBER 11, 1984.

TRUE COPY ATTEST:

/s/ KATHRYN COX
Kathryn Cox
Clerk of the Court

SUPREME COURT OF THE UNITED STATES

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* ERNEST M. McCOLLUM ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH SUPREME JUDICIAL DISTRICT

No. 84–629. Decided January 7, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This petition presents the question whether § 3 of the Federal Arbitration Act, 9 U. S. C. § 3 (1982), bars a court from issuing a temporary injunction pending arbitration of a contractual dispute.[1] Respondent is a former employee of petitioner Merrill Lynch, Pierce, Fenner and Smith, Inc. The employment contract signed by Merrill Lynch and respondent provided that in the event that respondent's employment with Merrill Lynch was terminated, respondent would not be allowed to remove client lists from the premises of Merrill Lynch nor to solicit any of Merrill Lynch's clients for a period of one year from the date of termination. The contract also provided that "any controversy between [respondent] and Merrill Lynch arising out of [respondent's] employment, or the termination of [respondent's] employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party . . . ."

[1] Section 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U. S. C. § 3 (1982).

6pp

Respondent left petitioner and obtained a position with one of petitioner's competitors. Alleging that respondent had violated the terms of his contract by absconding with petitioner's client lists and soliciting petitioner's clients, petitioner sued respondent for damages and injunctive relief in the District Court for Harris County, Texas. After entering a temporary restraining order enjoining respondent from any actions in violation of the contract, the District Court concluded that the dispute was arbitrable and that the court therefore lacked authority to adjudicate it. Accordingly, although the court was of the opinion that petitioner would have been entitled to injunctive relief but for the arbitration clause, the court dissolved its restraining order, denied petitioner's motion for a temporary injunction, and stayed all further proceedings in the action pending arbitration of the underlying dispute.

Petitioner appealed the District Court's order to the Texas Court of Appeals. Petitioner attacked the trial court's finding that the dispute was arbitrable, the denial of preliminary injunctive relief, and the order compelling arbitration. The Court of Appeals affirmed the lower court on all three issues. In upholding the denial of the preliminary injunctive relief pending arbitration, the Court of Appeals interpreted § 3 of the Federal Arbitration Act (applicable, in the court's view, to state as well as federal courts) to command an immediate halt to judicial proceedings once a court determines that the dispute underlying an action is arbitrable. Judicial resolution of the issues involved in a motion for injunctive relief, the court held, would be inconsistent with the Act's command that the merits of the dispute be determined by the arbitrator. Thus, the court concluded that § 3 of the Arbitration Act precludes a court from entering a preliminary injunction to maintain the status quo pending arbitration in any arbitrable dispute.

The Supreme Court of Texas denied petitioner's application for a Writ of Error to review the judgment of the Court of Appeals, and petitioner filed this timely petition for certiorari.

The question presented by this case—whether the Arbitration Act bars a court from issuing a preliminary injunction in a case subject to arbitration—is one that has divided the state and federal courts.[2] In adopting the position that preliminary injunctive relief is unavailable, the Texas Court of Appeals followed recent rulings of the federal Courts of Appeals for the Eighth and Tenth Circuits, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Hovey*, 726 F. 2d 1286, 1291 (CA8 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Scott*, No. 83–1480 (CA10 May 12, 1983) (unpublished order). However, the Second and Seventh Circuits, apparently untroubled by § 3 of the Arbitration Act, have routinely held that preliminary injunctions are available to maintain the status quo pending arbitration even in actions subject to the Arbitration Act's command that the court compel arbitration rather than adjudicating the underlying dispute. See *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F. 2d 348 (CA7 1983); *Connecticut Resources Recovery Auth.* v. *Occidental Petroleum Corp.*, 705 F. 2d 31 (CA2 1983); *Guinness-Harp Corp.* v. *Joseph Schlitz Brewing Co.*, 613 F. 2d 468 (CA2 1979); *Erving* v. *Virginia Squires Basketball Club*, 468 F. 2d 1064 (CA2 1972). The Supreme Court of Colorado has also recently held (without any discussion of the Arbitration Act)

[2] Petitioner contends not only that the Texas Court of Appeals misconstrued § 3 of the Arbitration Act, but also that § 3 is inapplicable in state court proceedings. Although this Court, in holding that state courts must apply § 2 of the Act, has reserved the question whether § 3 applies to the state courts, see *Southland Corp.* v. *Keating*, — U. S. —, —, n. 10 (1984), petitioner cites no authority for the proposition that § 3 does not apply, and there appears to be no substantial disagreement among the state courts over § 3's applicability. See *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, — U. S. —, —, n. 34; *Merrill Lynch, Pierce, Fenner & Smith* v. *Melamed*, 405 So. 2d 790 (Fla. App. 1981).

that a preliminary injunction to maintain the status quo is available in an action in which a court is otherwise obligated to stay its proceedings and compel arbitration. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *District Ct.*, 672 P. 2d 1015 (Colo. 1983).

The importance of resolving the question of the availability of preliminary injunctive relief in cases subject to arbitration is underscored by the confusion over the issue among the federal district courts—courts whose decisions on the issuance of preliminary relief are often effectively final, given that the imminence of arbitration may sharply limit a party's incentives to appeal an adverse decision. In an opinion written in 1951, Judge Weinfeld of the Southern District of New York concluded that the power to issue a preliminary injunction pending arbitration follows from the court's power to compel arbitration, for "[i]t would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach a contract and to substitute payment of damages for nonperformance.'" *Albatross S. S. Co.* v. *Manning Bros.*, 95 F. Supp. 459, 463 (quoting Holmes, Collected Legal Papers 175 (1920)). Judge Weinfeld's reasoning was adopted by the District Court for the Eastern District of New York in *Janmort Leasing, Inc.* v. *Econo-Car International, Inc.*, 475 F. Supp. 1282 (1979). In other recent cases, however, district courts have concluded that they lack the power to issue a preliminary injunction in cases subject to § 3 of the Arbitration Act. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *DeCaro*, 577 F. Supp. 616 (WD Mo. 1983); *Merrill Lycnh, Pierce, Fenner & Smith, Inc.* v. *Shubert*, 577 F. Supp. 406 (MD Fla. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thompson*, 575 F. Supp. 978 (ND Fla. 1983); *Smith* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F. Supp. 904 (ND Tex. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thomson*, 574 F.

Supp. 1472 (ED Mo. 1983). But cf. *Merrill Lynch, Pierce, Fenner & Smith* v. *de Liniere*, 572 F. Supp. 246 (ND Ga. 1983), in which the court, in a case governed by § 3, apparently assumed it had the power to grant a preliminary injunction but denied the injunction on the merits.

Whether the Arbitration Act bars the issuance of a preliminary injunction pending arbitration appears to be a frequently litigated question of considerable importance to the parties to arbitration agreements. The issue is one well worth definitive resolution by this Court. The most obvious obstacle to review of this particular case is that the arbitration proceedings will likely have begun and ended—mooting the issue of relief pending arbitration—by the time this Court has the opportunity to resolve the issue. This obstacle, however, is more apparent than real. The Court has recognized an exception to its general mootness doctrine for cases presenting issues that are "capable of repetition, yet evading review." See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). In *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), we held that "the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*, at 149. Both criteria are satisfied in this case. It would be the rare case indeed in which an arbitration proceeding compelled under the Arbitration Act would not have commenced before the issue of the propriety of injunctive relief pending arbitration found its way to this Court. Thus, unless the Court is willing to apply the "capable of repetition, yet evading review" doctrine, it is likely that the issue will never be conclusively resolved here. Moreover, the likelihood that petitioner will again find itself in the position of seeking injunctive relief pending arbitration of a contractual dispute with a former employee seems sub-

stantial: in fact, several of the courts that have so far examined the issue have done so in proceedings initiated by petitioner. The question, then, is one that is "capable of repetition, yet evading review;" and in view of its importance, I would grant certiorari to resolve it.